Supreme Court, U.S.
FILED
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No.

In The
SUPREME COURT OF THE UNITED STATES

DAN MARCHI

Petitioner,

v.

BOARD OF COOPERATIVE EDUCATIONAL SERVICES OF ALBANY, SCHOHARIE, SCHENECTADY, AND SARATOGA COUNTIES,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May the authority of a public school administration to censor an employee's speech of religious references be constitutionally extended to reach speech to adults outside the public school system?

2. Is self-censorship in response to promised governmental enforcement of a regulation sufficient injury in First Amendment cases to comply with Article III standing requirements?

3. May public school administrators bar teachers from honoring student requests for private prayer and from making reference to God in response to a private question volunteered by a student outside of the classroom during non-instructional time?

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BOARD OF COOPERATIVE EDUCATIONAL SERVICES OF ALBANY, SCHOHARIE, SCHENECTADY, AND SARATOGA COUNTIES,

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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Dan Marchi respectfully petitions this Honorable Court for a writ of *certiorari* to review the decision of the United States Court of Appeals for the Second Circuit affirming the order and judgment of the United States District Court for the Northern District of New York that Respondent Board of Cooperative Educational Services of Albany, Schoharie, Schenectady and Saratoga Counties (herein "BOCES") did not infringe Mr. Marchi's right of free speech in violation of the First Amendment, U.S. CONST AMEND. I, by

interpreting a BOCES directive to Mr. Marchi not to "us[e] any references to religion in the delivery of your instructional program unless it is a required element of a course of instruction . . . .," to prohibit the use of religious verbiage in a handwritten note to a parent of one of his students, and further holding that Petitioner lacked standing to challenge said directive as applied to personal speech with students during non-instructional time outside of the classroom.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, *Marchi v. Board of Coop. Educ. Serv.*, is reported at 173 F.3d 469 (2nd Cir. 1999) and appears in the appendix at A1 - A21. The opinion of the United States District Court for the Northern District of New York is unreported and appears in the Appendix at A22 - A32.

JURISDICTION

The petitioner seeks review by writ of *certiorari* from the decision of the Second Circuit Court of Appeals entered April 2, 1999. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTES AND REGULATIONS

The First Amendment of the Constitution of the United States of America provides in pertinent part as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

> right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. CONST. AMEND. I (1791). The BOCES directive issued to Mr. Marchi dated September 14, 1994 is set forth in the Appendix at A38-A39.

STATEMENT OF THE CASE

A. The Facts of the Case.

Mr. Marchi is a public school teacher employed by Respondent BOCES to instruct socially and emotionally disturbed ("SED") high school students. By all accounts, Mr. Marchi is an exemplary teacher who is well-known for his compassionate commitment to his students. From 1991 until 1994, Mr. Marchi, with the explicit permission of his supervisor, used religious materials during the course of his classroom instruction. JA at A-249. On September 14, 1994, John Daly, BOCES's director of education, issued a directive ("the directive") that stated in pertinent part: "You [Mr. Marchi] are to cease and desist from using any references to religion in the delivery of your instructional program unless it is a required element of a course of instruction for your students and has prior approval by your supervisor." App. at A69. Because of the apparent benefit to his students and for the sake of his conscience before God, Mr. Marchi continued to use religious references in his instruction although he was aware that BOCES considered such conduct to be in violation of the terms of the directive. Marchi Aff. App. at A43, para. 26-27.

Respondent BOCES brought charges against Petitioner urging his discharge for incorporating religious materials and discussion in his classroom instruction, and for insubordination.

JA at A-57-58. In the hearing before a Hearings Officer of the Division of Employer-Employee Relations Unit of the State of New York Education Department held on July 12 and July 18, 1995,the hearings officer found him to be a "sincere individual," and harbored "no doubt that his testimony . . . was forthright and credible." Joint Appendix on Appeal in the United States Court of Appeals for the Second Circuit (herein "JA") at A-62. The officer credited Petitioner's testimony that his students were "difficult to handle," and stated the officer's belief that "the students and parents who testified have been immeasurably aided by his devotion to his work." JA at A-65. The general tenor of the testimony by his students was reflected in the statement of one that "Mr. Marchi was, like, for a lot of people the only person that we could talk to that would listen and help us solve our problems." JA at A20. The record below was replete with letters from students and parents expressing profound respect and support for Mr. Marchi. JA at A-75 - A-98. The Board found Petitioner in violation of the directive and insubordinate, and suspended him without pay for one semester. JA at A-68. The Board specifically warned that "[Petitioner]'s return to service shall be conditioned upon his affirmation of his intent to comply with the directive issued to him on September 14, 1994." 173 F.3d at 473; JA at A-68.

As a result of the Board's ruling, Mr. Marchi knew that he could no longer use religious materials for homework assignments and classroom discussions. App. at A31. Nevertheless, Mr. Marchi found the directive vague in many senses. App. at A32. He appropriately requested clarification prior to his return to the classroom. App. at A53. In a letter dated December 28, 1995, Mr. Marchi asked Mr. Daly,

> First, If a student approaches me and asks me to pray with him in private, am I allowed to pray with the

> student? Second, if a student, without prompting, poses a question concerning religion and morality, am I allowed to answer it? If so how?
>
> Please write me with specific written guidelines with respect to the two issues raised above.
>
> God Bless you.
>
> Sincerely,
> /s/
> Dan Marchi

173 F.3d at 473; App. at A53.

In a letter of response dated January 16, 1996, Mr. Daly refused to clarify the directive, relying on the fact that Mr. Marchi had counsel represent him in his disciplinary proceedings. 173 F.3d at 473. Daly's letter of response is set forth in the Appendix at A54-A55.

Upon Mr. Marchi's return to teaching, he was assigned to a class of limited or non-communicative mentally retarded and autistic students. App. at A45, para. 53-4. During the course of this assignment, Mr. Marchi had difficulty with a student named Ryan Czech. App. at A45, para. 55-7. Ryan was acting out with physical violence toward himself and others. *Id.* Mr. Marchi met with Ryan's father, Paul Czech, to discuss techniques for calming Ryan. App at A45, para. 58. Mr. Czech gave Mr. Marchi a tape with religious music that he said would calm Ryan. App. at A45, para. 59. During the visit Mr. Czech discussed the importance of his faith in God and Christ with Mr. Marchi. App. at A45, para. 60. Mr. Marchi testified that the two men became friends. App. at A46, para. 66.

The tape calmed Ryan, as Mr. Czech had indicated. App. at A45, para. 62. Mr. Marchi scribbled a note of thanks in his own hand on a scrap piece of paper to Mr. Czech thanking him for the tape. App. at A45, para. 63. The note read:

> Hi Paul,
>
> Ryan had a good day today. I thank you and the Lord for the tape it brings the spirit of peace to the classroom. Tomorrow is a teacher's conference and dismissal is at 11:30.
>
> May God Bless you all richly.
>
> /s/ Dan

173 F.3d at 473. A copy of the original note is reproduced in the Appendix at A56. The note is reproduced as it appeared, rather than set out in text format, in order to facilitate the Court's understanding of its personal and informal nature.

The note was viewed by a teacher's aide who gave a copy of the note to Dr. DiPierro, Mr. Marchi's supervisor. 173 F.3d at 473, App. at A55. Dr. DiPierro informed Mr. Marchi by letter that his note to Mr. Czech violated the directive. *Id.* Dr. DiPierro warned that "my interpretation of the [directive] you signed on December 28, 1995 precludes you from communicating in this manner . . . . In closing, I cannot anticipate what action, if any, will be taken pursuant to this matter, but I nevertheless implore you to strictly follow [sic] the [directive]." 173 F.3d at 473; App. at A6. Dr. DiPierro's letter is set forth in the Appendix at A57-A58.

In the next academic year (1996-97), Mr. Marchi was assigned to teach SED students in another town, in a different school than the one in which he had previously taught. As the District Court noted, Mr. Marchi, because of the directive, "refrained from speaking to his students regarding religion *in any context or situation.*" District Court's opinion at p. 6, App. at A27 (emphasis added). Mr. Marchi, however, still exhibited the care and compassion for his students that he had in the past. Despite not making any references to religion, students approached Mr. Marchi with personal questions concerning moral dilemmas and requests for prayers. App. at A44-A45, para. 38-52.

These questions and requests for prayers posed a problem for Mr. Marchi. Upon his return to teaching SED students, Marchi's superiors had specifically "recommended" that he not pray with students on school grounds, even in private. John Daly testified:

> Q: Let me ask you, if a student approaches Dan Marchi and asked [sic] him to pray in private in the school, during school hours on school grounds, is he allowed to pray with that student?
>
> A: Is he allowed to? I believe he has been recommended that he not.
>
> Q: Would it be a violation of the directive of September 14, 1994 to pray with the student in private at the student's request?
>
> A: Yes, I believe so.

Transcript of Daly deposition, App. at A62, 173 F.3d at 479, App. at A7.

Further, BOCES's legal counsel in its brief to the Second Circuit specifically stated that the directive prohibited Mr. Marchi from honoring a student's request to pray a private prayer and from making reference to religion in response to a student's question during the school day. *E.g.*, Brief of Defendant-Appellee at 18-19. Aware of the strict interpretation of the directive, Mr. Marchi refrained from speaking in three areas:

1. Mr. Marchi refrained from talking with students who approached him privately to ask personal questions concerning morality, religion, and other private matters. Marchi Aff. App. at A44 , paras. 38-42.

2. Mr. Marchi refused to pray with students who asked him to pray with them and for them. Marchi Aff., App. at A44-A45 paras. 45-49.

3. Mr. Marchi refrained from closing his letters to parents with the phrase "God bless you." Marchi Aff. App. at A46 at para. 73.

B. Proceedings and Decisions in The Courts Below.

Mr. Marchi brought a civil action pursuant to 42 U.S.C. § 1983 alleging that Respondent BOCES violated his First Amendment rights by prohibiting him from closing letters to parents with the phrase "God bless you," and from praying with students who approached him privately, outside the classroom, with requests for prayer. JA at A-9 - A75. The fourth count of

the complaint, the only count that Mr. Marchi pursued on appeal, alleged:

> Because the directive of September 14 was vague and over broad, because the defendant willfully refused to clarify its meaning, and because the defendant attempted to use the directive of September 14 to control the contents of plaintiff's letters to parents, the defendant violated plaintiff's constitutional right to freedom of speech, freedom of association, freedom of religion, and academic freedom.

JA at A13.

BOCES moved for summary judgment, and Mr. Marchi filed a cross-motion for summary judgment on the fourth count of the complaint only. JA at A-4-A5. Mr. Marchi further requested leave to amend his complaint to drop all other causes of action and to break the fourth cause of action of his original complaint into four separate causes of action alleging that the directive was unconstitutional as applied to

> (1) his use of the phrase "God bless you" in informal notes to parents;
>
> (2) his responses to personal questions and requests for prayer raised by students outside of class but on school grounds;
> (3) his response to such questions and requests raised by students off school grounds, and
>
> (4) that the directive was unconstitutionally vague.

JA at A-5.

In a brief oral opinion, the District Court granted BOCES's motion and denied Mr. Marchi's motions:

> As I have already ruled, I do not find that the directive is vague. I think a person with average intelligence can understand and adhere to this directive. And if, as you are attempting to do now, there is argument [sic] to be made that there is some way that the directive could be considered to be an improper restriction on speech, that hasn't shown to have materialized yet. Defendant has not sanctioned the plaintiff or reprimanded the plaintiff for speaking to students outside the class. The only reprimand involved that I am aware of and the record shows is because of the letter [to Mr. Czech] that was written. And, of course, the Court finds it [the reprimand] to be appropriate. Therefore, no First Amendment restriction there.

District Court's opinion at 3-4, App. at A24. Judgment was entered January 22, 1998. *See* App. at A35-A36.

Mr. Marchi timely appealed the District Court's decision to the Second Circuit. Notice of Appeal, App. at A37. With respect to the letter to Mr. Czech that contained the phrases "Thank God" and "God Bless you," the panel held:

> Though Marchi's letter was slight in its references to religion, it sufficiently intruded religious content into a curricular matter, not involving a course in religion, such that school authorities could reasonably be concerned that communications of this sort would expose it to non-frivolous Establishment Clause challenges. Therefore, BOCES' interpretation of the directive as prohibiting [closing a thank you note with

> religious references] does not impermissibly infringe Marchi's free exercise right.

173 F.3d at 477, App. at A14.

With respect to the directive's application to Mr. Marchi's responses to personal questions and requests for prayer raised by students during instructional time outside of class but on school grounds, the Second Circuit held:

> [Mr.] Marchi has not demonstrated a credible fear that BOCES intends to enforce the directive in an impermissible manner. Though Daly testified that BOCES administrators had, in the past, "recommended" to Marchi that he not pray with students on school grounds, even in private, such a recommendation does not give rise to a justiciable controversy. The directive has not been applied to prohibit such prayer.

173 F.3d 479, App. at A18. Mr. Marchi now brings this petition seeking a writ of *certiorari* from this Court to resolve these important issues of constitutional law.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI IN ORDER TO CONSTRUCT A FRAMEWORK THAT RESOLVES THE CONFLICT BETWEEN THE ESTABLISHMENT CLAUSE AND THE FREE EXERCISE AND FREE SPEECH CLAUSES IN THE CONTEXT OF PUBLIC EMPLOYEE RELIGIOUS SPEECH.

This case involves a novel question of law that affects the free speech and free exercise of religion rights of hundred of thousands of government employees. From the President of the United States to municipal government workers, government employees make reference to God in conversation with other adults on a daily basis. By articulating a standard that allows public school officials to exercise prior restraint over an employee's religious speech based upon a "reasonable concern" of exposure to a "non-frivolous Establishment Clause challeng[e]," the Second Circuit has subordinated public employee's free speech and free exercise rights to hypothetical Establishment Clause claims. The imaginary claim need not even be meritorious under the Second Circuit's holding. Rather the government need only demonstrate a "reasonable concern" that it might be exposed to a non-frivolous claim before suppressing speech.

The Court should grant *certiorari* to review the case in order to construct a framework that negotiates the tension between the Establishment Clause and the Free Exercise and Free Speech clauses.. The Court has from time to time dealt with the potential conflict between the clauses in the context of private citizens' speech in government fora. *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993), *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753 (1995). The Court has never dealt with the issues raised by a government employee's religious speech with other adults. The Second Circuit panel thus wrote on a blank slate. The traditional and well-developed doctrines of disruptive workplace speech and teacher's classroom speech to students are inapplicable to a teacher's personal thank you note to a parent that contained the phrase "God Bless you."

The disruptive workplace doctrine posits that the government may suppress an employee's speech to prevent disruption of the operation of its business. *Waters v. Churchill*, 511 U.S. 661, 671 (1995). The government may not, however, force employees to relinquish their First Amendment rights simply because they have received the benefit of public employment. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Government employees retain their constitutional rights to free exercise of religion and to free speech. *Tucker v. Dep.t of Educ.*, 97 F.3d 1204, 1210 (9th Cir. 1996) (state employee has a right to advocate religion and to pray at work); *Boring v. Buncombe County Bd. of Educ.*, 98 F.3d 1474, 1480 (4th Cir. 1996)(teacher still retains First Amendment rights even in the classroom).[1]

This case does not involve a work place disruption. Mr. Marchi's letter thanking his friend, Mr. Czech, was not disruptive. BOCES did not claim, either before the District Court or the Second Circuit, that closing letter's to parents with "God Bless you" caused or would cause any disruption. In over eight years of teaching, no parent or student has ever complained about Mr. Marchi's religious speech. Marchi Aff. at A41, para. 14-16. The only justification that BOCES offered for suppressing Mr. Marchi's speech was concern about a potential Establishment Clause violation.

Each of the cases cited by the Second Circuit dealt with teachers giving classroom instruction to students who were

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[1]So cherished by our people is right to free exercise of religion that the United States Congress enacted Title VII which forbids private employers from discriminating against employees for the express of their religious beliefs. *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995) (Title VII prevents employers from discharging employees for praying and advocating his faith to co-workers).

compelled to attend the class. The legal constructs developed to regulate such speech are not useful to determine the boundaries of permissible speech contained in a personal communication between adults in a noncompulsory setting. Respondent demonstrated the problems that can arise in the absence of clear constitutional guidelines when BOCES Supervisor of Special Education Leo DiPierro stated in his March 25, 1996 letter that Mr. Marchi was prohibited from communicating religious messages to parents because "parents are part of the instructional process." App. at A57-58. BOCES focused on the recipents of the speech, *i.e.* , parents, because it had no direction concerning when, if ever, parents are part of the instructional process. School districts need articulable, cogent guidelines for proper employee conduct in this area.

Also to be distinguished is the doctrine that this Court developed in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). *Hazelwood* involved a school's right to control the classroom and restrict student speech. In *Hazelwood*, a school official refused to allow students in a journalism class to publish an article that contained references to sex, pregnancy, and birth control. The official believed that the article did not conform to proper journalistic standards and exposed younger students to inappropriate materials.

The Court upheld the official's decision not to allow publication of the paper. *Id* at 267. The Court reasoned that teachers are in the best position to ensure that the students learn whatever lessons an activity is designed to teach. *Id.* at 272. Thus, teachers may limit the content of speech by students, provided that the limitations are "reasonably related to legitimate pedagogical concerns." 484 U.S. at 273.

Hazelwood's concerns about pedagogical interests is of little applicability in a case where a school seeks to control a teacher's speech with parents. Granting a teacher the power to restrict student speech is a far cry from granting the government power to restrict a teacher's letter to a parent who is a friend. Moreover, phrases used to close letters to parents do not implicate any of the concerns that the Court identified as justifying suppression of speech. Under *Hazelwood*, in order to limit speech rights, a school must have a legitimate pedagogical interest. A letter to a parent is unrelated to ensuring that students learn a particular lesson or are not exposed to any inappropriate materials. The *Hazelwood* framework is simply not applicable to this case.

This case presents the Court with an opportunity to explain the dynamic between the Establishment Clause, Free Exercise and Free Speech clauses. It would also permit the Court for the first time to develop a framework that deals fairly and effectively with public employee religious speech. It is this Court itself that should set the delicate balance required to deal with two constitutional interests that may conflict.

The balance that the Second Circuit panel struck was draconian, not delicate. The appeals court struck the balance well in favor of the employer by holding that the employer needs to have a legitimate expectation that a potential Establishment Clause claim would be meritorious, or even a reasonable expectation that a claim would be brought at all, before it may suppress an employee's speech. Petitioner asks this Court to review whether a governmental employee's First Amendment freedoms may be conditioned on the government's concern that it might be exposed to some kind of Establishment Clause litigation.

To posit that the Establishment Clause mandates that government educators censor a teacher's religious references in a note to a parent, particularly when the parent is also a friend who shares the teacher's faith, is to distort beyond recognition the principles that animate that clause. In the often-quoted words of Chief Justice Burger in *Lynch v. Donnelly*, "the Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not mere tolerance, of all religions, and forbids hostility toward any. Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." 465 U.S. 668, 678 (1984).

The Second Circuit held that a teacher's scribbled thank-you note to a parent that contained the phrases "Thank God" and "God Bless you" raised a non-frivolous Establishment Clause issue. Under the Second Circuit's analysis, any governmental employer could legally censor its employees from saying "God Bless you." Before the law gives government administrators the authority to sanitize "God Bless you" from their employees' lexicon, this Court ought to review such a fundamental departure from our historical tradition of government officials employing religious phrases.

II. THE COURT SHOULD GRANT CERTIORARI IN ORDER TO RESOLVE THE CONFLICT AMONG

THE CIRCUIT COURTS OVER WHETHER SELF-CENSORSHIP IN RESPONSE TO PROMISED GOVERNMENTAL ENFORCEMENT OF A REGULATION IS SUFFICIENT INJURY IN FIRST AMENDMENT CASES TO CONFER STANDING UNDER ARTICLE III.

A. THE SECOND CIRCUIT'S OPINION IS IN CONFLICT WITH THE STANDING REQUIREMENT TO CHALLENGE A CHILLING PRIOR RESTRAINT ON SPEECH ARTICULATED BY OTHER CIRCUIT COURTS OF APPEAL.

The Second Circuit held that a plaintiff who is deterred from exercising his First Amendment rights by the potential enforcement of a governmental rule or regulation does not have standing to challenge the constitutionality of the rule. Rather, the court opined, only the actual enforcement of the rule in an unconstitutional manner will give a plaintiff standing to challenge it. 173 F.3d at 479. This "actual enforcement" requirement created by the Second Circuit conflicts with the precedent of this Court and with other Circuit Courts of Appeal concerning standing in First Amendment cases.

It is true, as the panel below noted, that BOCES has not yet applied the directive to private prayer between Mr. Marchi and his students. However, BOCES took the position in its brief to the Second Circuit that the directive prohibited private prayer and religious speech with students on school grounds. Further, as the court itself noted, Mr. Marchi's supervisor had "recommended" to Marchi that he not pray with students on school grounds, even in private. The Second Circuit still held

that there was no justiciable controversy because BOCES had not *actually enforced* the directive with respect to his responses to personal questions and requests for prayer raised by students outside of class.

It is no mystery why the directive has not been enforced. Mr. Marchi testified that he has refused requests from students to pray privately with them on campus because his supervisor had warned him not to. Mr. Marchi heeded the recommendation of his supervisor rather than risk losing his job.

Without question Article III of the Constitution requires that there be an actual case or controversy to confer jurisdiction upon the federal courts. The case and controversy mandate necessitates a showing that (1) the plaintiff personally has suffered some actual or threatened injury; (2) the injury can be traced to the defendant's actions; and (3) the injury can be redressed by a favorable decision. *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979). The question that Petitioner asks this Court to address is whether self imposed censorship in response to potential governmental enforcement of a rule or regulation satisfies the injury requirement of Article III. The Second Circuit has held that governmental deterrence of speech is insufficient to meet the injury requirement of Article III. The Second Circuit is in conflict with other Circuit Courts of Appeal on this issue.

A number of Circuits have held that in the First Amendment realm, plaintiffs do not have to expose themselves to enforcement of a regulation in order to challenge it. *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8 (1st Cir. 1996); *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir. 1997), *Krantz v. City of Fort Smith*, 160 F.3d 1214 (8th Cir. 1998); *Thomas v. Anchorage Equal Rights Comm'n*, 165

F.3d 692 (9th Cir. 1999); *ACLU v. Florida Bar*, 999 F.2d 1486 (11th Cir. 1993). More to the point, the First and Eleventh Circuits have held that a constitutional injury exists when plaintiffs refrain from exercising their right to speech in order to avoid the consequences of enforcement of a government rule. *New Hampshire Right to Life, supra*; *ACLU v. Florida, supra*. The First and Eleventh Circuits have described this type of unique First Amendment injury as the injury of "self-censorship."[2]

In *ACLU v. Florida Bar*, supra, the plaintiff, a candidate for judicial office, brought a First Amendment challenge to a judicial ethical canon that the plaintiff believed would proscribe a campaign speech he wished to make. The state ethics committee issued an advisory opinion that the plaintiff's proposed speech would violate the ethical canon in question. The committee, however, explicitly declined to say whether it would actually seek disciplinary sanctions against plaintiff if he made the speech. Plaintiff refused to give the speech. The Eleventh Circuit found that plaintiff had standing to challenge the constitutionality of the ethical canon prior to its enforcement. The court held that "self-censorship" in First Amendment cases is a sufficient injury under Article III to confer standing upon plaintiffs. 999 F.2d at 1492.

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[2]Of course, the reason for self-censorship cannot be "imaginary or speculative." *Babbit*, 442 U.S. at 298. However, this not a case about an imaginary threat of enforcement. BOCES, prior to the litigation, said it would apply the directive to prohibit Mr. Marchi's response to student's private requests for prayer on school grounds; BOCES director testified the directive would be so enforced; and BOCES's counsel in its brief to the Second Circuit vigorously defended their right to enforce the directive in the situation described above.

In *New Hampshire Right to Life Political Action Comm. v. Gardner, supra*, a political action committee ("PAC") challenged the constitutionality of a New Hampshire law that limited such committees' expenditures to $1,000 per election. The PAC inquired of the State Attorney General whether his office would enforce the law. The Attorney General advised it would enforce the statute, if a complaint were filed. The PAC refused to exceed the $1,000 campaign contribution limit, and brought a pre-enforcement challenge to the law alleging that the law chilled its exercise of its First Amendment rights. The First Circuit held that self-censorship in response to promised enforcement of a government regulation is an actual injury under the First Amendment and provides the plaintiff standing under Article III. 99 F.3d at 14.

This Court should resolve the conflict between the Second Circuit and the First and Eleventh Circuits and clarify whether self-censorship in response to promised governmental enforcement of a regulation is sufficient injury in First Amendment cases to maintain Article III standing.

B. THE SECOND CIRCUIT'S RULE FOR STANDING IS IN CONFLICT WITH THE SUPREME COURT'S OWN STANDARD.

The Second Circuit's decision below also conflicts with decisions of the Supreme Court. While this Court has never spoken in terms of the injury of "self-censorship," it has found, in loyalty oath cases from the 1960's, that a constitutional injury may arise from the chilling effect of governmental regulations. *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967) (state teachers had standing to challenge loyalty statute because of choice they faced between compliance and loss of employment); *Bagget v. Bullitt*, 377 U.S. 360, 372 (1964)(where loyalty oath

is vague, employee may restrict his or her speech to that which is unquestionably safe rather than risk the loss of employment. First Amendment concerns permits standing to challenge oath even in the absence of enforcement).

This Court created a two-part test to determine if plaintiffs possess standing where they claimed their right to free speech was chilled not by actual enforcement of the regulation, but by its existence. The Court, in *Laird v. Tatum*, 408 U.S. 1, 9 (1972), held that in order to show a constitutional injury, (1) the challenged exercise of the governmental power must be regulatory, prescriptive, or compulsory in nature, and (2) the complaint was either presently or prospectively subject to the challenged regulation. The Second Circuit has grafted a third requirement on the two-part test - that the government must have actually enforced the regulation against the plaintiff.[3]

The Supreme Court has held that, in First Amendment cases, plaintiffs need not wait for actual enforcement of the statute in order to have standing to challenge it. In *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988), book sellers brought a suit alleging that, under their interpretation of a Virginia Statute, it was a criminal offense to merely display sexually orientated works. The State responded that plaintiffs' interpretation of the law was incorrect and that plaintiff's lacked standing because the action was brought before the statute

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[3]This Court has repeatedly held that First Amendment plaintiffs, unlike any other plaintiffs, are permitted to challenge a statute because it threatens the free expression rights of others whom might be subjected to enforcement sometime in the future. Although this doctrine, known as the overbreadth doctrine, is not applicable in this case, it reveals how lenient Article III requirements are in First Amendment case. The Second Circuit has reversed course from this historical policy and made standing requirements *more* stringent in First Amendment cases.

became effective. This Court held that the Article III injury requirement was met. 484 U.S. at 393. The Court reasoned that if the plaintiffs' interpretation of the statute was correct, they would either risk prosecution or be forced to comply at the expense of their First Amendment rights. *Id.* Such a dilemma gave the plaintiffs standing even prior to the statute's enforcement. *Id.*

The Second Circuit has placed Mr. Marchi on the horns of a grave dilemma: either succumb to his supervisor's order and forsake his free speech and free exercise rights, or disregard the order and risk being suspended or fired for insubordination. This is the very type of dilemma that this Court has construed to create standing. The Second Circuit in denying Mr. Marchi standing because the directive has not actually been enforced compromises the values of the First Amendment that this Court and other circuits have articulated.

III. THE COURT SHOULD GRANT CERTIORARI IN ORDER TO CONSTRUCT CONSTITUTIONAL GUIDELINES GOVERNING TEACHER COMMUNICATION WITH STUDENTS DURING NON-INSTRUCTIONAL TIME.

The Second Circuit's implicit holding is that private on campus speech during non-instructional time in response to requests for prayer from students and students' questions about religion and morality is not constitutionally protected speech. The court held that "Mr. Marchi has not demonstrated a credible fear that BOCES intends to enforce the directive in an impermissible manner." 173 F.3d at 479; App. at A18. The decision rests on either one of two grounds: that BOCES would not enforce the directive with respect to Mr. Marchi's private on

campus speech, or that enforcement of the directive to such speech is not constitutionally impermissible.

It is not disputed that BOCES would enforce the directive. BOCES admitted that Mr. Marchi's supervisor "recommended" to him that he not privately pray with students. Further, BOCES's director of education testified that such speech violated the directive. Finally, BOCES's legal counsel represented to a United States Court that the directive would be applied to such speech. Mr. Marchi, without question, had a credible fear that BOCES would enforce the directive to his private on campus speech in response to student's questions and requests for prayer.

The Second Circuit's decision appears then to be based upon the unexplained premise that BOCES may permissibly suppress Mr. Marchi's responses to private questions and request for prayer by students. Giving the power to school administrators to bar private voluntary prayer between student and teacher at the student's request affects every student's and teacher's right to free exercise, freedom of speech, and freedom of association.

This Court has never addressed at what point, if any, a teacher sheds the imprimatur of the state when speaking to students. On the one hand, this Court has made it clear that when a teacher speaks on matters related to the curriculum, such speech is indelibly stamped with the state's imprimatur and thus subject to regulation by it. *Edwards v. Aguillard*, 482 U.S. 578 (1987). On the other hand, the Court has never suggested that the imposition of the state's imprimatur on a governmental employee is independent of the nature of the conversation and the nature of the relationship between the speaker and the listener. *Lee v. Weisman*, 505 U.S. 577 (1992); *Board of Educ.*

of Westside v. Mergens, 496 U.S. 226, 248-53 (1990); *Rosenburger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

There are several important questions raised but not answered by the panel below that merit review by this Court. Does the Constitution give teachers the right to honor students' requests for prayer when the student voluntarily makes such a request outside of the classroom? Is the Establishment Clause violated when a teacher prays with a student after class, in private, at the student's request? Is there a constitutional distinction between teacher initiated speech and teacher responsive speech in deciding whether teacher/student prayer is permissible?

One circuit, for example, has found a critical constitutional difference between teacher initiated speech inside the classroom and teacher responsive speech outside the classroom. The Tenth Circuit, in *Bishop v. Aronov*, 926 F.2d 1066 (10th Cir. 1991), noted that a university could limit speech by a teacher while conducting class, but could not limit a teacher's response to a question by a student about his religious views outside of the classroom. 926 F.2d at 1076.

This Court, to clarify the First Amendment rights of teachers and students and to develop and explain the limits of constitutionally permissible interaction between students and teachers with respect to students' request for private prayer and religious information, should grant *certiorari*.

CONCLUSION

For the reasons expressed above, Petitioner respectfully requests that this Court grant petitioner's request for a writ of *certiorari* and review the decision of the Second Circuit Court of Appeals on the merits.

Respectfully submitted this 30th day of June, 1999.

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[4] Petitioner wishes to recognize the able research assistance provided for this brief by Loretha Barnett, Univ. of Oklahoma Law School (*J.D.* expected 2000).

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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173 F.3d 469

DAN MARCHI, Plaintiff-Appellant, v. BOARD OF COOPERATIVE EDUCATIONAL SERVICES OF ALBANY, SCHOHARIE, SCHENECTADY, AND SARATOGA COUNTIES, Defendant-Appellee.

Docket No. 98-7213

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

October 21, 1998, Heard
April 2, 1999, Decided

PRIOR HISTORY: Appeal from the January 23, 1998, judgment of the United States District Court for the Northern District of New York (Frederick J. Scullin, Jr.) granting summary judgment to regional school board and rejecting teacher's facial and as-applied challenges to directive restricting religious activity.

DISPOSITION: Affirmed.

COUNSEL: Thomas Marcelle, Slingerland, N.Y., for plaintiff-appellant.

Leslie B. Neustadt, Maynard, O'Connor, Smith, & Caralinotto, Albany, N.Y., for defendant-appellee.

JUDGES: Before: NEWMAN and JACOBS, Circuit Judges, and TSOUCALAS, * Judge.

* Honorable Nicholas Tsoucalas, of the United States Court of International Trade, sitting by designation.

OPINION BY: JON O. NEWMAN

OPINION: [*472]

JON O. NEWMAN, Circuit Judge:

This appeal concerns the tension between two constitutional principles -- separation of church and state and the free exercise of religion -- in the context of public education. Specifically, we must decide whether a school board's attempt to avoid Establishment Clause violations by restricting the religious expression of one of its teachers infringes that teacher's free exercise rights. Dan Marchi appeals from the January 23, 1998, judgment of the District Court for the Northern District of New York (Frederick J. Scullin, Jr., District Judge) to the extent that it granted summary judgment to the Board of Cooperative Educational Services ("BOCES") and dismissed Marchi's claim that a BOCES directive, ordering Marchi to refrain from using religious references in the delivery of his instructional program,

is unconstitutionally vague and overbroad. In addition, Marchi challenges the denial of his motion for leave to amend his complaint. We conclude that the challenged directive is neither vague nor overbroad, and that Marchi's proposed amended complaint failed to set forth claims ripe for judicial review. Accordingly, we affirm.

Background

Marchi is a certified special education teacher who has taught socially and emotionally disturbed high school students since 1977. BOCES is a regional voluntary cooperative association of school districts with responsibility for the administration of special educational programs. In 1989, Marchi alleges that he underwent a dramatic conversion to Christianity. He acknowledges that he shared this experience with his students and that, in the fall of 1991, he modified his instructional program to discuss topics such as forgiveness, reconciliation, and God. See Complaint PP 17, 19, 22.

On September 14, 1994, John Daly, the Director of Special Education at BOCES, issued a "cease and desist" letter, directing Marchi to refrain from using religion as part of his instructional program. The letter stated:

During our meeting last week, we discussed your frequent references to religion while dealing with students. As you know, public schools are prohibited from offering instruction in support of religious beliefs or practices. Your personal beliefs about the role of religion in our society and its value to families and their children cannot be a part of the instruction given to your students.

Consequently, you are to cease and desist from using any references to religion in the delivery of your instructional program unless it is a required element of a course of instruction for your students [*473] and has prior approval by your supervisor, Dr. DiPierro. I am sure that you realize the seriousness of this matter and will comply with this direction.

Marchi refused to abide by the directive because, in his view, to do so "would be detrimental to his students" and "would violate his conscience before God." Complaint P 34. After a teaching assistant informed BOCES that Marchi was continuing to use religious themes and materials in the course of his teaching, BOCES charged Marchi in March of 1995 with insubordination and "conduct unbecoming a teacher." The following month, Marchi was suspended indefinitely for violating the directive. A hearing on the charges was held before a state Department of Education hearing officer in July of 1995. The hearing officer found that Marchi had committed an act of insubordination and imposed a penalty of six months' suspension. Marchi's return to teaching was conditioned on his commitment, in a written affirmation, to adhere to the directive. Upon advice of counsel, Marchi affirmed that he would adhere to the directive.

On the same day that Marchi signed the affirmation, he sent a letter to Daly asking for clarification of the directive. Specifically, he asked if private prayer with a student, at the student's request, was permitted, and if he could respond to students' questions concerning religion. Daly responded as follows:

> As a condition of returning to work, you signed an affirmation committing yourself not to use any references to religion in the delivery of your instructional program unless it is a required element of

> an approved course of instruction and you obtain the prior approval of your supervisor.
>
> Based upon the fact that the disciplinary action against you resulted from your defiance of an identical directive rather than a misunderstanding, together with the fact that you had the opportunity to consult with counsel before you signed the affirmation, I must assume that you fully understood the terms of your affirmation and that you will abide by them.

On his return to work in January of 1996, Marchi was reassigned to a Comprehensive Development Skills ("CDS") class. The students in CDS classes, who are autistic or mentally handicapped, have little or no communication skills. Shortly after Marchi resumed teaching, a teacher's aide saw a letter from Marchi to Paul Czech, the father of Ryan Czech, a student in Marchi's CDS class. Mr. Czech had sent an audiotape of religious music to school in Ryan's lunch box, along with a note stating that the music calmed Ryan. In response, Marchi wrote:

> Ryan had a good day today. I thank you and the LORD for the tape[;] it brings the Spirit of Peace to the classroom. Tomorrow is a teacher's conference and dismissal is at 11:30. May God Bless you all richly!

After learning of the letter, Dr. DiPierro, Marchi's supervisor, met with Marchi. Marchi indicated that because the letter was written to a parent, he did not consider it to be part of his "instructional program," and thus regarded it as outside the directive's reach. In a letter response, DiPierro informed Marchi: "since you communicated these messages in your capacity as a BOCES teacher, and in as much as parents are part of the

instructional process, my interpretation of the agreement you signed . . . precludes you from communicating in this manner." No action was taken against Marchi in connection with this incident.

In the summer following the 1995-1996 school year, Marchi filed this section 1983 action, alleging that (1) BOCES violated his rights to academic freedom, free association, free speech, and free exercise of religion, as well as his rights under the Religious Freedom Restoration Act, by suspending him in 1995; (2) BOCES violated his right to due process and retaliated [*474] against him by assigning him to teach a CDS class upon his return to teaching; (3) the directive is unconstitutionally vague and overbroad; and (4) the directive had been applied to proscribe protected speech between Marchi and students' parents. Marchi sought a preliminary injunction to enjoin BOCES from enforcing the directive; the District Court denied the request.

Subsequently, BOCES moved for summary judgment. After discovery was completed, Marchi cross-moved for summary judgment and sought leave to amend his complaint in order to expand his allegations relating to the directive's purported overbreadth and chilling of protected speech. The proposed amended complaint included allegations that BOCES violated Marchi's First Amendment rights by interpreting the directive to constrain Marchi with respect to his communications with students on matters not related to school curriculum both on and off school grounds during non-class times. Marchi contended that the deposition testimony of Daly, the author of the directive, demonstrated that BOCES intended to apply the directive to curtail these forms of allegedly protected speech.

During his deposition, Daly had been asked a number of questions relating to the meaning of the term "instructional program," as it is used in the directive. In response to the question whether the term covers an on-campus conversation during school hours, but outside the classroom, between a teacher and students on matters unrelated to the school curriculum, Daly stated, "I believe it does, yes." Marchi's attorney then asked: "Again, assuming that Mr. Marchi and the student had a conversation . . . not related to the curriculum, off of school grounds, out of school hours, is that part of Mr. Marchi's delivery of his instructional program?" Daly responded: "Well, in my own personal opinion, given the influence that teachers have, I believe that a teacher's influence is extended often beyond the parameters of the school day."

The District Court granted BOCES's summary judgment motion and denied Marchi's request for leave to amend his complaint. Because Marchi challenges only the dismissal of his claim that the directive is unconstitutionally vague and overbroad and the denial of his motion for leave to amend his complaint, we limit our summary of the District Court's decision to those rulings.

Noting that "thousands of teachers of common intelligence are able to distinguish between their instructional program and their personal life and do so without violating the Establishment Clause," the District Court concluded that the directive was not vague. With respect to its alleged overbreadth, the District Court found that the directive "addresses only [Marchi's] instructional program and no other aspect of [his] personal life" and that "how [BOCES] might interpret the directive is not relevant to whether the directive is constitutional on its face." Accordingly, the District Court dismissed Marchi's facial challenge and denied his request for leave to add a related claim. Turning to the other allegations of the proposed amended

complaint, the District Court held that Marchi's concerns regarding his inability to discuss religion with his students in any context for fear of violating the directive were not ripe for litigation because Marchi had failed to demonstrate a credible fear that BOCES might enforce the directive in an unconstitutional manner.

Discussion

On appeal, Marchi contends that the directive is unconstitutional as applied to three forms of communication and that the directive is facially invalid because it is vague. We review the District Court's grant of summary judgment de novo, *see Heilweil v. Mount Sinai Hospital*, 32 F.3d 718, 721 (2d Cir. 1994), and its denial of Marchi's motion for leave to amend his [*475] complaint for an abuse of discretion, *see Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993). It will be convenient to consider first Marchi's "as applied" challenge to the directive.

I. Constitutionality of the Directive as Applied

Marchi contends that the directive is unconstitutional as applied to (1) his use of religious phrases in his communications with parents of students, namely, his letter to Ryan Czech's father; (2) his responses to personal questions and requests for prayer raised by students off school grounds; and (3) his responses to such questions and requests raised by students outside of class but on school grounds. BOCES has stated officially that it considers the first form of communication to violate the directive. It has not, however, done so with respect to the latter two forms of expression.

The directive is unquestionably a restraint on Marchi's First Amendment rights. However, not all restraints on free exercise and free speech rights are invalid. Frequently, the validity of a particular restraint depends on the context in which the expression occurs. And, as the Supreme Court has repeatedly emphasized, the special nature of public educational institutions gives rise to "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 507, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969) (citations omitted). Of particular relevance to this appeal, the Court has noted that "the interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgement of free speech otherwise protected by the First Amendment." *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 394, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993) (quoting *Widmar v. Vincent*, 454 U.S. 263, 271, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981)).

Our Establishment Clause jurisprudence provides that, in addition to having a secular purpose and not having the primary effect of advancing or hindering religion, state policies or actions must not foster excessive government entanglement with religion. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971). Although the Lemon test has been criticized, it has not been overruled. However, the Court appears to have modified the test somewhat in *Agostini v. Felton*, 521 U.S. 203, 234, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997), which instructs us to focus on the question of whether the challenged action can reasonably be viewed as a governmental endorsement of religion. Under this jurisprudence, courts have not only struck down

school-sponsored religious activities and official endorsement of religion, *see, e.g., Lee v. Weisman*, 505 U.S. 577, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992) (prayer at graduation ceremony); *Wallace v. Jaffree*, 472 U.S. 38, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985) (moment of silence), but they have also held that public school officials have the authority to prevent teachers from giving students and others the impression that the school prefers a particular religion, or religion in general, see, *e.g., Helland v. South Bend Community School Corp.*, 93 F.3d 327 (7th Cir. 1996); *Peloza v. Capistrano Unified School District*, 37 F.3d 517 (9th Cir. 1994). Thus, schools may direct teachers to "refrain from expression of religious viewpoints in the classroom and like settings," *Bishop v. Aronov*, 926 F.2d 1066, 1077 (11th Cir. 1991); indeed, schools have a constitutional duty to make "certain . . . that subsidized teachers do not inculcate religion," *Lemon*, 403 U.S. at 619.

The establishment-of-religion principles of *Lemon* and *Agostini*, combined with the free-exercise principles of *Lamb's Chapel*, provide the framework for considering the specific claims raised on [*476] this appeal. These decisions reveal two important aspects of the Supreme Court's religion-clauses jurisprudence. First, when courts adjudicate claims that some governmental activity violates the Establishment Clause, they must be careful not to invalidate activity that has a primary secular purpose and effect and only incidental religious significance. Second, when government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause and the limitations it imposes might restrict an individual's conduct that might well be protected by the Free Exercise Clause if the individual were not acting as an agent of government. *Cf. Waters v. Churchill*, 511 U.S. 661, 671, 128

L. Ed. 2d 686, 114 S. Ct. 1878 (1994) (plurality opinion) (Government has "freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large[.]"); *id.* at 671-75.

The decisions governmental agencies make in determining when they are at risk of Establishment Clause violations are difficult, and, in dealing with their employees, they cannot be expected to resolve so precisely the inevitable tensions between the Establishment Clause and the Free Exercise Clause that they may forbid only employee conduct that, if occurring, would violate the Establishment Clause and must tolerate all employee conduct that, if prohibited as to non-employees, would violate the Free Exercise Clause. When government is both the initiator of some religiously related actions, through the conduct of its employees, and the regulator of the extent of such actions, through the conduct of its supervising employees, it need not determine, at the peril of legal liability, precisely where the line would be drawn if its employees were not involved. Though school boards, like all instrumentalities of government, must observe the basic free exercise rights of its employees, the scope of the employees' rights must sometimes yield to the legitimate interest of the governmental employer in avoiding litigation by those contending that an employee's desire to exercise his freedom of religion has propelled his employer into an Establishment Clause violation. In discharging its public functions, the governmental employer must be accorded some breathing space to regulate in this difficult context. For his part, the employee must accept that he does not retain the full extent of free exercise rights that he would enjoy as a private citizen.

Guided by these principles, we turn to the specific claims raised in this action.

A. Communications with Parents

Marchi challenges BOCES's application of the directive to his communication with Mr. Czech, contending that a "letter thanking a friend who is a parent[] is private speech."

The circumstances surrounding Marchi's February 28, 1996, letter to Mr. Czech, however, demonstrate that Marchi wrote the letter in his capacity as a teacher. As a significant part of his duties as a CDS teacher, Marchi is responsible for behavior modification of the children in his class. Marchi's letter concerned an audiotape the father of a student had sent to a teacher for use in the son's class. Though the letter was no doubt sent primarily as merely a "thank you," it concerned what occurred in the classroom, commenting specifically on the effect the music had on Mr. Czech's son. Marchi testified during his deposition that he had used the tape -- "Wee n1 Sing the Bible" -- during his class and that it was "a very effective way of controlling Ryan, . . . not to mention the rest of the kids also." In writing Mr. Czech, Marchi was communicating with a student's parent on a matter directly related to his professional duties as a CDS teacher.

----------Footnotes----------

n1 "Wee" is the trademark of a series of children's music tapes.

----------End Footnotes----------

[*477] Although the letter was thus within the scope of the directive's coverage of "delivery of [Marchi's] instructional program," it is a closer question whether the letter's content was

reasonably perceived by BOCES as within the scope of the directive's proscription of "references to religion." The directive bars "references to religion in the delivery of your instructional program unless it is a required element of a course of instruction" and has a supervisor's prior approval. The phrases of the letter arguably constituting "references to religion" were minimal. The closing -- "May God Bless you all richly!" -- is barely more of a "reference to religion" than the common "God bless you" offered to someone who has sneezed. Yet the first sentence of the letter contains two references with which BOCES was understandably concerned. For receiving the tape, Marchi thanked not only the student's father but also "the LORD," and he assessed the tape as bringing "the Spirit of Peace to the classroom." The latter reference, though perhaps intended to comment only on the calming influence of the tape's content, was reasonably perceived by BOCES as a reference to religion, especially in the context of the letter's other religiously related phrases.

Because BOCES has a strong, perhaps compelling, interest in avoiding Establishment Clause violations, see *Lamb's Chapel*, 508 U.S. at 394, it may proscribe interactions between teachers and parents that risk giving the impression that the school endorses religion. A school risks violation of the Establishment Clause if any of its teachers' activities gives the impression that the school endorses religion. As the Ninth Circuit has stated:

> While at the high school, whether he is in the classroom or outside of it during contract time, [a public school teacher] is not just any ordinary citizen. He is a teacher. . . . He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable because he is a teacher. The

> likelihood of high school students equating his views with those of the school is substantial.

Peloza, 37 F.3d at 522. In the related context of school regulation of students' speech, the Supreme Court has held that a school may regulate "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988).

Though Marchi's letter was slight in its references to religion, it sufficiently intruded religious content into a curricular matter, not involving a course in religion, such that the school authorities could reasonably be concerned that communications of this sort would expose it to non-frivolous Establishment Clause challenges. Therefore, BOCES's interpretation of the directive as prohibiting this conduct does not impermissibly infringe Marchi's free exercise rights. n2

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 To the extent that Marchi seeks to challenge the regulation of his communications with students' parents on matters unrelated to school, Marchi has failed even to allege that BOCES has attempted to regulate such communications.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

Marchi's claim that he was not aware that a letter of this sort would fall within his instructional program is sufficiently answered by two circumstances. First, he was not penalized by BOCES for writing the letter. Second, he is now on notice that letters written to students' parents in his capacity as a teacher are part of his instructional program.

B. Off-Campus Expression

Based on the deposition testimony of Daly, Marchi requested leave to amend his complaint to allege that BOCES's interpretation of the directive as applying to off-campus discussions with students on matters not related to the curriculum, as well as his responses to [*478] students' requests for prayers, has chilled his protected expression. Although leave to amend is usually freely granted, it may be denied within the trial court's discretion where the proposed amendment would be futile. *See Ruffolo*, 987 F.2d at 131.

Article III of the Constitution limits the jurisdiction of federal courts to cases or controversies. A hypothetical or abstract dispute does not present a case or controversy: "The question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality" to justify judicial resolution. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 85 L. Ed. 826, 61 S. Ct. 510 (1941). It is Marchi's burden to allege facts demonstrating that the case presents a justiciable controversy. See *Renne v. Geary*, 501 U.S. 312, 316, 115 L. Ed. 2d 288, 111 S. Ct. 2331 (1991).

For a case to be deemed justiciable under Article III, it must be ripe. See *Abbott Laboratories v. Gardner*, 387 U.S. 136,

148-49, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967), overruled on other grounds, *Califano v. Sanders*, 430 U.S. 99, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977). Indeed, ripeness is a "constitutional prerequisite to exercise of jurisdiction by federal courts." *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45, 51 (2d Cir. 1980) (citation omitted). Where a party seeks to challenge a statute or policy prior to its enforcement, the ripeness doctrine requires that the challenge grow out of a "real, substantial controversy between parties" involving a "dispute definite and concrete." *Babbitt v. United Farmworkers National Union*, 442 U.S. 289, 298, 60 L. Ed. 2d 895, 99 S. Ct. 2301 (1979) (citation omitted). This requirement is intended "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott*, 387 U.S. at 148. The Supreme Court has instructed that the ripeness inquiry requires courts to consider both the fitness of the issues for judicial decision and the hardship resulting from withholding judicial consideration. *See id.* at 149.

In this case, Marchi challenges all applications of the directive to his off-campus communications with students on matters unrelated to the school curriculum. Given the unique circumstances of student-teacher relationships, it is easy to imagine a variety of circumstances that would fall within the challenged hypothetical application of the directive, some of which may be regulated constitutionally and others of which may not. For instance, if Marchi supervised students on a weekend field trip, or hosted an end-of-the-school-year celebration, restriction of Marchi's religious expression might be permissible in order to avoid an Establishment Clause violation. On the other hand, if Marchi happens to see some of his students after school in a non-school-related context, BOCES's

interest in avoiding an Establishment Clause violation might not be implicated.

Since BOCES has not threatened to apply the directive to any of Marchi's off-campus expressive activities, a court entertaining Marchi's challenge would be forced to guess at how BOCES might apply the directive and to pronounce on the validity of numerous possible applications of the directive, all highly fact-specific and, as of yet, hypothetical. Such an open-ended and indefinite challenge is not well suited to judicial decision.

In assessing the possible hardship to the parties resulting from withholding judicial resolution, we ask whether the challenged action creates a direct and immediate dilemma for the parties. *See Abbott*, 387 U.S. at 152-53. A plaintiff must show either prosecution pursuant to the challenged provision or that a sufficiently real and immediate threat of prosecution exists. *See Poe v. Ullman*, [*479] 367 U.S. 497, 503-08, 6 L. Ed. 2d 989, 81 S. Ct. 1752 (1961). In order to avoid the chilling of protected speech, however, "governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 12-13, 33 L. Ed. 2d 154, 92 S. Ct. 2318 (1972). Even in this context, though, some credible fear of enforcement must exist. *See id.* at 13-14.

Marchi has failed to demonstrate such a credible fear. The testimony of Daly on which he relies is both ambiguous and, significantly, qualified as Daly's "personal opinion." BOCES has never indicated that it intends to apply the directive to Marchi's off-campus expressive activities on matters unrelated to his teaching. Thus, withholding judicial decision in this instance is not likely to result in significant hardship for Marchi.

In sum, Marchi's proposed amendments relating to his off-campus expressive activities fail to present controversies ripe for judicial decision. Under these circumstances, the District Court did not exceed its discretion when it denied Marchi's request for leave to amend his complaint.

C. On-Campus Expression

Marchi also contends that the District Court erred in ruling unripe his claim that the directive is unconstitutional as applied to his on-campus, after-class conversations with students on matters not related to the curriculum and to his responses to students' requests for prayer.

This proposed amended claim, like the one discussed above, poses a broad hypothetical question: Can the directive constitutionally be applied to limit Marchi's out-of-class, on-campus expressive activities? Again, a wide spectrum of expressive activity meets this description, and the answer to the question turns on the precise nature of the expressive activity. Because Marchi raises his claim hypothetically, a district court would be forced either to guess at how BOCES might apply the directive or to set the permissible parameters of the directive itself, in contravention of the rule against advisory opinions. Such a dispute is not well-suited to judicial review.

Likewise, Marchi has not demonstrated a credible fear that BOCES intends to enforce the directive in an impermissible manner. Though Daly testified that BOCES administrators had, in the past, "recommended" to Marchi that he not pray with students on school grounds, even in private, such a recommendation does not give rise to a justiciable controversy. The directive has not been applied to prohibit such prayer. Thus, to the extent that Marchi's proposed amended complaint

seeks to challenge application of the directive to on-campus private prayer with students, the amendment would be futile because the claim is premature.

To the extent Marchi seeks to challenge application of the directive to other on-campus, out-of-class, discussions with students about religion, he has similarly failed to demonstrate a credible fear that BOCES intends to enforce the directive to such speech. Under these circumstances, any hardship Marchi may experience from the withholding of judicial resolution is not sufficient to demonstrate a ripe claim. The District Court did not exceed its discretion when it refused to grant Marchi's request for leave to amend.

II. Facial Validity of the Directive

Marchi also contends that the directive is unconstitutionally vague on its face because "instructional program" is not defined and BOCES has refused to define it or to articulate standards for determining whether a particular activity falls within its definition.

When a plaintiff alleges that a law or policy violates the First Amendment on its face, he "must demonstrate that the challenged law either 'could never be applied in a valid manner' or that even though it may be validly applied to the [*480] plaintiff and others, it nevertheless is so broad that it 'may inhibit the constitutionally protected speech of third parties.'" *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11, 101 L. Ed. 2d 1, 108 S. Ct. 2225 (1988) (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984)). Basic principles of due process assure that punishment should be imposed only if the defendant could reasonably be expected to have known that his

conduct was proscribed. As the Supreme Court has held, a statute or policy is unconstitutionally vague if people of common intelligence must guess at its meaning and may differ as to its application. See *Grayned v. Rockford*, 408 U.S. 104, 108-09, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972). Additionally, in order to prevent arbitrary and discriminatory enforcement, a law must provide sufficient standards to guide its application. See id. And, "where a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974).

In this case, the directive prohibits Marchi from "using any references to religion in the delivery of [his] instructional program unless it is a required element of a course of instruction . . . and has prior approval by . . . Dr. DiPierro." Though the key proscription -- "references to religion" -- will inevitably require interpretation in various circumstances, its basic meaning is as clear as the context permits, and, as a facial matter, gives Marchi fair notice of what conduct is proscribed.

Moreover, Marchi's assertion that BOCES has refused to provide any explanation of the term "instructional program" is belied by the record. In light of Marchi's history of intentionally violating the directive, it was not unreasonable for BOCES to view Marchi's initial request for clarification, which it received simultaneously with his signed affirmation agreeing to abide by the directive, as insincere. More importantly, the record, including Marchi's own testimony, reveals that Marchi has received extensive guidance with regard to the directive's parameters since his return to teaching.

Aware that precise delineation of sanctionable conduct is close to impossible, courts have granted schools, acting in their capacity as employers, significant leeway. For example, in *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993), the First Circuit held that a school is not required to state expressly all types of objectionable conduct in order to place teachers on notice that some conduct is sanctionable. Rather, the Court held that the relevant inquiry is whether, "based on existing regulations, policies, discussions, and other forms of communication between school administration and teachers," it was "reasonable for the school to expect the teacher to know that her conduct was prohibited." Id. at 454.

BOCES is not obligated to articulate every imaginable situation that might fall within the directive's purview. *Cf. diLeo v. Greenfield*, 541 F.2d 949, 954 (2d Cir. 1976) (noting, on facial challenge to state teacher's termination statute, that "[a] saving construction is especially appropriate in an area such as discipline of teachers, where a myriad of uncontemplated situations may arise and it is not reasonable to require a legislature to elucidate in advance every act that requires sanction"). The language of the directive, which expressly limits its application to Marchi's instructional program, as well as the guidance Marchi has received, give Marchi sufficient notice of what conduct is proscribed by the directive. In sum, the directive is constitutional. It is neither facially vague nor overbroad.

Conclusion

For the foregoing reasons, the judgment of the District Court is affirmed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DAN MARCHI,

Plaintiff,

-versus- 96-CV-1294
(MOTION DECISION)

BOARD OF COOPERATIVE EDUCATIONAL SERVICES,

Defendant.

TRANSCRIPT OF PROCEEDINGS held in and for the United States District Court, Northern District of New York, at the James T. Foley United States Courthouse, 445 Broadway, Albany, NY 12207, on FRIDAY, JANUARY 9, 1998, before the HON. FREDERICK J. SCULLIN, JR., United States District Court Judge.

APPEARANCES:

FOR THE PLAINTIFF:
THOMAS J. MARCELLE, ESQ.

FOR THE DEFENDANT:
MAYNARD, O'CONNOR LAW FIRM
BY: LESLIE B. NEUSTADT, ESQ.

(Following oral argument, the Court issued the following oral decision:)

THE COURT: Well, I had a more detailed analysis, but I can't find it now. But with respect to your claim, as I pointed out already, Counsel, you have a problem with ripeness with some of the allegations you are making. And the Court cannot find that the alleged chilling effect is such that rises to a constitutional violation on the facts before me. And what may happen with respect to the plaintiff's activities outside the school, outside the school grounds, has not yet happened. And I cannot rule that there is a First Amendment --or find that there is sufficient evidence in the record here to support this matter going forward to a jury trial.

Insofar as your Counts I and III have to do with the First Amendment claim, the Court finds that the -- under the cases cited, Silano, Hazlewood and the other cases, that the School Board and school authorities do have the authority to restrict the speech of its instructors, and particularly the plaintiff's speech, in the manner in which they have.

As I already ruled, I do not find that the directive is vague. I think any person with average intelligence can understand and adhere to this directive. And if , as you are attempting to do now, there is argument to be made that there is some way that the directive could be considered to be an improper restriction on speech, that hasn't

shown to have been materialized yet.

Defendant has not sanctioned the plaintiff or reprimanded the plaintiff for speaking to students outside the class. The only reprimand involved that I am aware of and the record shows is because of the letter that was written. And, of course, the Court finds it to be appropriate. Therefore, no First Amendment restriction there.

I don't find a due process claim here because I don't see a property right or liberty right that's at risk or was taken away by virtue of the plaintiff returning to school not in the class he desired. For the same reason, I don't find any retaliation, I don't find an adverse employment action, nor do I find any protected speech on that issue here.

All right. So I am gonna rule, based upon the entire record before the Court, that the plaintiff has not sustained its burden and shown that there is a material issue of fact as to these claims that needs to be resolved.

And therefore , I am going to grant summary judgment for the defendant as to all claims.

Did you submit an order already?

MS. NEUSTADT: Yes, I did.

THE COURT: All right. we will use that. Anything further at this time?

MR. MARCELLE: No, Judge.

THE COURT: I may have a more detailed decision if I find my notes here, but, in essence, that's my ruling.

MR. MARCELLE: Thank you.

THE COURT: All right. Thank you.

MS. NEUSTADT: Thank you, your Honor.

(This matter adjourned at l0:48 AM.)

(On January 12, 1998, the Court supplemented the above decision with the following:)

THE COURT: Plaintiff brought this action pursuant to 42 USC Section 1983 and 42 USC Section 2000bb, Religious Freedom Restoration Act. This Court previously denied plaintiff's motion for a preliminary injunction in this matter, finding plaintiff failed to demonstrate a likelihood of succession the merits. Presently before the Court is defendant's motion for summary judgment and plaintiff's cross-motion to amend his complaint and summary judgment thereon.

Plaintiff has been a teacher for the Board of Cooperative Educational Services , BOCES, since 1977 and taught socially and emotionally disturbed (SED) children since 1995. Around September 1994, John Daly, the Director of Special Education for BOCES, issued a directive to plaintiff ordering that plaintiff cease and desist from using religious materials in instructional program and from interjecting his personal religious beliefs into classroom discussion unless he had prior approval from his supervisor. Plaintiff admittedly defied the order and continued to use his classroom to espouse his personal religious beliefs. Defendant suspended plaintiff in April 1995 for his continued violation of the directive.

Plaintiff returned to work around January 1996 after signing an affirmation of his intent to comply with the original directive. Plaintiff was reassigned to the comprehensive development skills (CDS) children upon returning, but was returned to his SED classes for the 1996-1997 school year.

Plaintiff has refrained from speaking to his students regarding religion in any context or situation.

Plaintiff moved this Court in October of 1996 for a preliminary injunction to enjoin enforcement of the directive. The Court denied the motion and concluded that the directive was neither overbroad nor vague.

The Federal Rules of Civil Procedure 15(a) provides that a party may amend a complaint once as a matter of right prior to the answer being served and, thereafter, a party may amend only with leave of court. Leave should be granted only when justice so requires. In any event, such relief should not be granted where there is undue delay, bad faith, futility of the amendment or undue prejudice to the opposing party. See Foeman versus Davis, 371 US 178, 182, 1962. For the reasons stated below, the Court finds that plaintiff's proposed amended complaint is futile and his cross-motion to amend is denied.

Religious Freedom Restoration Act. The Supreme Court found this Act to be unconstitutional in City of Boerne versus Flores , 117 S.Ct. 2157, 1997, and as such, this cause of action is dismissed.

Plaintiff's suspension, First Amendment Violation. School administrators may limit the content of school sponsored speech so long as the limitations are reasonably related to legitimate pedagogical concerns. See Hazlewood School District versus Kuhlmeier, 484 US 260, 271,1988 (no First Amendment violation where guest teacher banned from school for showing a picture of a naked-breasted woman to demonstrate a math principle). The Supreme Court has further indicated

that the interest of the state in avoiding an establishment clause violation may be a compelling one justifying an abridgement of free speech otherwise protected by the First Amendment. Lamb's Chapel versus Center Moriches Union Free School District, 508 US 384, 394, 1993, quoting Widmar versus Vincent, 454 US 263, 271, 1981.

Defendant was in violation of the establishment clause by virtue of plaintiff's admitted conduct. To the extent defendant's suspension of plaintiff impeded plaintiff's First Amendment rights, defendant had a compelling interest in preventing further violations. Further, plaintiff's suspension was reasonably related to defendant's pedagogical concern over the content and nature of plaintiff's teachings. Counts I and III of plaintiff's original complaint are dismissed.

Overbreadth and vagueness of the directive, Count IV of the original complaint, Count IV of the amended complaint. A law is void on its face for vagueness if people of common intelligence must guess at its meaning and differ as to its application. See Grayned versus Rockford, 408 US 104,108 to 109, 1972. As the Court stated at the preliminary hearing and as pointed out by defendant, thousands of teachers of common intelligence are able to distinguish between their instructional program and their personal life and do so without violating the establishment clause. Plaintiff's personal inability to separate his religious agenda from his professional responsibilities does not render the directive unconstitutionally vague.

Nor is the directive overbroad. It addresses only plaintiff's instructional program and no other

aspect of plaintiff's personal life. How defendant might interpret the directive is not relevant to whether the directive is constitutional on its face. To the extent plaintiff seeks the Court to set the parameters of the directive, the Court points out that it will not give advisory opinions. Count IV of plaintiff's original complaint is dismissed and leave to amend on this issue is denied.

Scope of the directive, First Amendment ripeness, Counts 1, II, III of amended complaint. Plaintiff has voiced concerns regarding his inability to discuss religion with his students in any context for fear of violating the directive and, as such, the directive has had a chilling effect on his First Amendment rights to free speech. The basis of plaintiff's fear is derived from Mr. Daly's deposition, wherein Mr. Daly said that he considered certain hypothetical situations, regarding off-campus conversations with students, to be part of plaintiff's instructional program. The context of the hypothetical is unclear and Mr. Daly's response to the question was his personal opinion and not necessarily the position of defendant.

Because the directive is constitutional, absent some unconstitutional action by defendant whereby it prohibits plaintiff from engaging in protected speech, these claims are not ripe for litigation. To the extent that plaintiff relies on Daly's deposition as having a chilling effect on his speech, the Court notes that the ripeness doctrine instructs courts to decide only those cases where a real, substantial controversy exists and they should not address mere hypothetical questions. Wright and Miller, 13A, Section 3532.2.

The Court finds that plaintiff's perceived

threat of enforcement of a constitutional directive in a questionably unconstitutional manner is not sufficiently ripe to present a claim under the First Amendment. Mr. Daly's personal opinion regarding a hypothetical situation posed by plaintiff's counsel does not equate to a credible specific threat of illegal enforcement by defendant BOCES. See Laird versus Tatum, 408 US 1, 13 to 14, 1972, (allegations of a subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; the federal courts established pursuant to Article III of the Constitution do not render advisory opinions).

To the extent plaintiff personally interprets the directive to prohibit constitutionally protected speech, the Court notes that a plaintiff cannot make a ripe case by misreading a statute and claiming a need to assuage self-induced fears. Wright and Miller, 13A, Section 3532.5. Therefore, the Court will not grant leave to amend the complaint on these grounds.

Retaliation, Count V and VI of original complaint, Count V of amended complaint. To establish a First Amendment retaliation claim under Section 1983, a plaintiff must show, one, that his speech was protected under the First Amendment; and, two, that the defendant took some adverse employment action that was motivated or substantially caused by plaintiff's exercise of free speech. See Ferran versus Town of Grafton, 979 F Supp 944, Northern District of New York, 1997, citing Gaaliardi versus Village of Pawling, 18 Fed 3d 188, 194 Second Circuit, 1994.

Plaintiff asserts that being placed with CDS children limited his speech with children because

some are non-communicative. Plaintiff failed to cite any case law or constitutional right for a teacher to have an entire class of communicative children.

Further, plaintiff failed to show that defendant's placement of plaintiff with CDS children was an adverse employment action. The Court finds defendant's reason to wait until the next full school year before placing defendant back with SED children, as to not interrupt the class, to be credible and reasonable. This claim is, therefore, dismissed and plaintiff's motion to amend this claim is denied.

Plaintiff's original complaint also raised a due process cause of action. As discussed above, plaintiff has failed to demonstrate a property or liberty interest in teaching SED children. Therefore, this claim is dismissed as well.

In conclusion, plaintiff's cross-motion to amend his complaint is denied. Plaintiff's cross-motion for summary judgment is denied.

Defendant's motion for summary judgment is granted and plaintiff's complaint is dismissed in its entirety.

CERTIFICATION:

I, THERESA J. BERICAL, CSR, RPR, Official Court Reporter in and for the United States District Court, Northern District of New York, do hereby certify that I attended at the time and place set forth in the heading hereof; that I did make a stenographic record of the proceedings held in this matter and cause the same to be transcribed; that the foregoing is a true and correct transcript of the same and the whole thereof.

/s/Theresa J. CSR,
RPR Official Court Reporter

Dated: February 4th, 1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DAN MARCHI,
Plaintiff,

v.

BOARD OF COOPERATIVE EDUCATIONAL SERVICES OF ALBANY, SCHOHARIE, SCHENECTADY and SARATOGA COUNTIES,
Defendant

96-CV-1294 (FJS)

APPEARANCES:

THOMAS MARCELLE, ESQ
71 Devonshire Drive
Slingerlands, New York 12159
Attorney for Plaintiff

MAYNARD, O'CONNOR, SMITH
CATALINOTTO & D'AGOSTINO, LLP
80 State Street
Albany, New York 12207

OF COUNSEL:
LESLIE NEUSTADT, ESQ

FREDERICK J. SCULLIN, JR., D.J.:

ORDER

Plaintiff sued Defendant pursuant to 42 U.S.C. §1983 and 42 U.S.C. § 2000bb for alleged constitutional violations. The Court heard oral argument on January 9. 1998 regarding Defendant's motion for summary judgment and Plaintiff's cross-motion to amend his complaint. After careful review of the parties' submissions, the parties' arguments, and the applicable law, the Court granted Defendant's motion for summary judgment on the record.

Therefore, for the reasons stated on the record on January 9, 1998, it is hereby

ORDERED, that Plaintiff's cross-motion to amend his complaint is DENIED, and it is further

- ORDERED, that the Defendant's motion for summary judgment is GRANTED, and Plaintiff's complaint is DISMISSED in its entirety.

IT IS SO ORDERED.
Date: January 22, 1998
Syracuse, New York

/s/ Frederick J. Scullin, Jr.
United States District Judge.

United States District Court
Northern District of New York

JUDGMENT IN A CIVIL CASE

DAN MARCHI

V. CASE NUMBER: 98(X-1294 (FJS)

BOARD OF COOPERATIVE EDUCATIONAL SERVICES OF ALBANY, SCHOHARIE, SCHENECTADY and SARATOGA COUNTIES

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the defendant's motion for summary judgment is granted, ordered that the Plaintiff's cross motion to amend his complaint and for summary judgment are denied and it is further ordered that the plaintiff's complaint is dismissed in its entirety.

All of the above pursuant to the order of the Honorable Judge Frederick J. Scullin, Jr, dated the 22nd day of January, 1998.

JANUARY 23,1998

DATE

LAWRENCE K. BAERMAN

CLERK

/S/ JOANNE BLESKOSKI
(BY) DEPUTY CLERK.

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

DAN MARCHI

V.

96-CV-1294 (FJS/RWS)
Notice of Appeal

BOARD OF COOPERATIVE EDUCATIONAL SERVICES OF ALBANY, SCHOHARIE, SCHENECTADY,& SARATOGA COUNTIES.

NOTICE OF APPEAL

SIR:

PLEASE TAKE NOTICE that Dan Marchi, the plaintiff in the above captioned action, hereby appeals to the United States Court of Appeals for the Second Circuit from an order granting defendant's motion for summary judgment, denying plaintiff's cross motion for summary judgment, and denying plaintiff's motion to amend his complaint (Scullin, J.) entered in this action on January 22, 1998.

Dated: February 13, 1998

/s/ Thomas Marcelle
Attorney for the Plaintiff
71 Devonshire Dr.
Slingerlands, New York 12159
Phone: (518) 475-0806

BOARD OF COOPERATIVE EDUCATIONAL SERVICES
1979 Central Avenue, Albany, New York 12205

SPECIAL EDUCATION DIVISION
(518) 456-9064 FAX (518) 456-9057

September 14, 1994

Mr. Dan Marchi
RD #2, Box 235
Central Bridge, NY 12035

Dear Dan,

During our meeting last week, we discussed your frequent references to religion while dealing with students. As you know, public schools are prohibited from offering instruction in support of religious beliefs or practices. Your personal beliefs about the role of religion in our society and its value to families and their children cannot be a part of the instruction given to your students.

Consequently, you are to cease and desist from using any references to religion in the delivery of your instructional program unless it is a required element of a course of instruction for your students and has prior approval by your supervisor, Dr. DiPierro. I am sure that you realize the seriousness of this matter and will comply with this direction.

Best wishes for a good year at Mohonasen. If you have any questions or concerns, please let me know.

Sincerely,

/s/ John J. Daly, Director

pc:: Dr. Kellogg
Dr. Trautwein
Dr. DiPierro
Personnel File

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DAN MARCHI

V. 96-CV-1294(FJS/RWS)

Affidavit

BOARD OF COOPERATIVE EDUCATIONAL SERVICES OF ALBANY, SCHOHARIE, SCHENECTADY, & SARATOGA COUNTIES.

AFFIDAVIT OF DAN MARCHI

Dan Marchi, being duly sworn, deposes and states as follows:

I. BACKGROUND

1. I am the plaintiff in this action.

2. From 1977 until 1995, I exclusively taught socially and emotionally disturbed (herein after "SED") high school students for various BOCES programs.

3. SED students are student who exhibit abusive behaviors, inappropriate behaviors, violent behaviors, addictive behaviors, and/or criminal behaviors.

4. During the course of my years teaching, students (and even young people who were not my students) sought me out to talk privately about their problems and ask questions concerning issues such as the death of a loved one, the divorce of parents, the alienation of a parent/child relationship, the extreme shyness associated with acne or weight problems, thoughts of suicide, the concept of forgiveness and other serious problems.

5. Some of these issues are reflected in exhibit A (letters from parents, students, and co-teachers). I adopt the statements contained in exhibit A as my own and make them a part of this affidavit as if fully set forth herein.

6. These questions occurred before class, after class, and off the school grounds at the student's request.

7. The students sought me out or requested that I visit at home, in the hospital, or even in jail because of a personal relationship as friends.

8. Prior to my suspension in the spring of 1995, I would address each student's problem the best that I could in an honest and straight forward manner that sometimes included references to God, I did so as their friend, not as their teacher.

9. My students (and even young people who were not in my academic classes) sought me out, before class, during breaks, after class, and off school grounds to pray privately for them or with them for a variety of problems.

10. I never approached nor prompted any student with respect to prayer, it was always by their own initiative.

11. I, prior to my suspension in the spring of 1995, would honor students' requests for prayer because of my belief in God and in my capacity as friend, not as teacher.

12. Prior to my suspension in the spring of 1995, I would close letters to parents that I knew as friends and knew had faith in God, with the phrase "God bless you."

14. No parent or student complained that I made references to religion to students in private conversations with them.

15. No parent or student complained that I honored requests to pray privately with students.

16. No parent complained that I close my correspondence with the phrase "God bless you."

17. In fact, in doing all these things, many troubled students' lives were bettered. (See exhibit A).

18. Prior to my suspension in the spring of 1995, I used religious materials for homework assignments and classroom discussion.

II. The directive issued

19. On August 6, 1997, I was present at 80 State at the offices of Maynard, O'Connor, Smith & Catalinotto, when my attorney asked Mr. John Daly questions while under oath; I heard the questions and I heard Mr. Daly's responses; the questions and responses are set forth in exhibit B and they accurately reflect the questions and responses I heard; I incorporate exhibit into this affidavit as if each and every question and each and every response that Mr. Daly made was set forth herein.

20. Mr. Daly is the director of special education for defendant.

21. In his capacity as the director of special education for defendant, Mr. Daly can hire, fire, transfer, and discipline teachers.

22. In his capacity as the director of special education for defendant, Mr. Daly, on September 14, 1994, issued a directive that stated: "you are to cease and desist form using any references to religion in the delivery of your instructional program unless it is a required element of a course of instruction for your student and has prior approval by your supervisor." Exhibit C.

23. In his capacity as the director of special education for defendant, Mr. Daly has the authority to issue the directive.

24. In his capacity as the director of special education for defendant, he has the authority to enforce the directive.

25. In his capacity as the director of special education for defendant, Mr. Daly has the authority to interpret the meaning and application of the directive.

26. I continued to use religious materials for homework assignments and classroom discussion for the sake of the students and my conscience towards God.

27. I knew doing so was a clear violation of the directive.

28. As a result, in the Spring of 1996, I was suspended for one semester.

III. Request for clarification of the directive

29. I was allowed to return to teaching after the suspension, conditioned on a written affirmation that I would abide by the directive.

30. On December 28, 1995, I signed such an affirmation. (Exhibit D is my affirmation and I incorporate in into my affidavit as if fully set forth herein.)

31. I knew that the directive applied to using religious materials for homework assignments and classroom discussion, something I have not done (nor intend to do) since returning from my suspension.

32. The directive was unclear in many respects.

33. I asked for clarification of this directive.

34. By letter dated December 28, 1995, I asked two questions regarding the parameters of the directive: "First if a student approaches me and asks me to pray with him in private, am I allowed to pray with the student? Second if a student, without prompting, poses a question concerning religion or morality, am I allowed to answer it? And if so how?" (Exhibit E is my letter dated December 28, 1995 and I incorporate it into my affidavit as if fully set forth herein.)

35. By letter dated January 16, 1996, Mr. Daily refused to clarify the directive. (Exhibit F is Mr. Daly's letter dated January 16, 1996, and I incorporate it into my affidavit as if fully set forth herein.)

IV. The directive's expansive reach

36. Mr. Daly stated the directive applied to conversations with students after school, outside of school grounds, on subjects not related to the curriculum. (exhibit B at p. 15, In 17-25).

37. Additionally, Mr. Daly stated the directive applied to a situation where a student seeks me out and privately asks for prayer. (Exhibit B at p.30)

38. Since my return to teaching, students, without prompting, have privately asked me personal questions concerning religion, morality, and other serious problems in their lives.

39. These requests have occurred both on and off the school grounds.

40. The students have come to me with these problems as a friend, not a teacher.

41. I have declined to answer these questions because of the directive.

42. I would answer students' questions with references to God, if the directive did not prohibit me from doing so.

43. For example, last year, a student approached me after school and told me that he, the student, was contemplating suicide and wanted to know if there was more to life and what would happen to him if he died.

44. I initially declined to answer the question because of the directive.

45. Students, without prompting, have and continue to ask me privately to pray with them and for them.

46. These requests have occurred both on and off the school grounds.

47. The students have come to me with such requests as a friend, not a teacher.

48. I would pray for or with students if the directive did not prohibit me form doing so.

49. I would answer students' questions with references to God, if the directive did not prohibit me from doing so.

50. Since my return to teaching, a couple of my co-workers wanted to meet with me after school in the classroom to discuss the students and pray for their problems.

51. I told them that I could not because of the directive.

52. I would pray with my co-workers if the directive did not prohibit me from doing so.

53. In January, 1996, Mr. Daly assigned me to CDS students rather that SED. CDS stands for comprehensive development skills, even though in my eighteen (18) years I have never taught such students nor I have been trained to teach such students.

54. CDS students are autistic, mentally retarded, and mainly non-communicative.

55. In my CDS class, I had a student by the name of Ryan Czech.

56. Ryan had Down's syndrome.

57. Ryan was having a difficult time in class and acted out with physical violence towards himself and others.

58. I met with Ryan's father, Paul Czech, to discuss techniques of calming Ryan down.

59. Mr. Czech gave me a tape with religious music that he said would have a calming effect on Ryan.

60. Mr. Czech discussed his faith in God and Christ with me.

61. The tape calmed Ryan as Mr. Czech said it would.

63. Consequently, I wrote Mr. Czech a letter thanking him for the tape that helped calm Ryan. (Exhibit G is my letter dated February 28, 1996 and I incorporate it into my affidavit as if fully set forth herein.)

64. In that letter, I used the phrases "thank the Lord" and "may God bless you.'

65. I did not write that letter solely in the capacity as a teacher.

66. I wrote it as a friend to Mr. Czech and based on our personal relationship and prior conversations.

67. I only used religious phrases to parents with whom I knew had a faith in God.

68. Mr. Daly met with Dr. Leo DiPierro regarding my letter to Paul Czech. (Exhibit B at p. 29-30)

69. After the meeting, at Mr. Daly's direction and with his approval, Dr. DiPierro sent me a letter dated March 25, 1996. (Exhibit H is Dr. DiPierro letter dated March 25, 1996 and I incorporate it into my affidavit as if fully set forth herein.)

70. The letter stated that the directive prohibited me from making religious references in letter to parents.

71. Mr. Daly stated that a letter to a parent is part of an instructional program. (Exhibit B at p. 25).

72. Mr. Daly stated that references to religion, which include the phrase "may God bless you", are prohibited in letters to parents. (Exhibit B at p. 25).

73. Because the letter threatened me with discipline, I have refrained from closing my letters to parents with the phrase "God bless you."

V. Defendant refuses to clarify directive as applied to the classroom.

74. The defendant has not provided me with objective guidelines in which to conform my conduct with respect to how I may answer students' questions.

75. In a letter dated December 28, 1995, I requested specific guidelines about how to answer students' questions that dealt with religion. (Exhibit E).

76. In a letter dated January 16, 1995, Mr. Daly refused to provided specific guidelines. (Exhibit F).

77. During Mr. Daly's deposition, he could not articulate any objective criteria despite being repeatedly asked to do so. (Exhibit B at 25-9).

78. In fact, the only guidance I ever received was an admonishment to "strictly" adhere to the directive and make no reference to religion at all. (Exhibit H).

79. The lack of guidance and the warning letter (exhibit H) has inhibited me from answering students' questions.

80. When questions arise that arguably require me to make a reference to religion, I have either not answered them, have told my students that I could not answer them, or I have provided a less than complete answer to their questions.

81. I have been constrained in answering students' questions because of the directive.

VI. Employment aspect

82. In his decision, hearing officer Eldeman was obviously moved by Dan Marchi's accomplishments as a teacher, he stated that "[Dan Marchi] is an excellent teacher dealing effectively with BOCES' most troubled youth." [Defendant's exhibit A to its motion for summary judgement].

83. Upon reinstatement, I indicated a desire to return to his class of SED students.

84. I was informed by his supervisor, Dr. Leo DiPierro, that there were openings for SED teachers.

85. I later found out there were three openings in SED.

86. However, upon my reinstatement Mr. Daly assigned me to CDS.

87. CDS is comprehensive developmental skills. CDS students are autistic, mentally retarded and mainly non-communicative.

88. I have never taught CDS students in my eighteen (18) years of teaching.

89. I have no training or education with respect to teaching CDS students.

90. I have only taught SED, and in that capacity generally have been recognized as one of defendant's best teachers of SED students.

91. Mr. Daly assigned teachers to SED classes who had much less experience and qualifications than I; the teacher assigned to take over my class had only three years experience teaching SED students.

92. I believe I was place with CDS students because they are non-communicative.

93. In the summer of 1996, the defendant assigned me to a CDS class again.

94. Again this assignment occurred despite openings in SED classes and my experience and seniority in teaching SED classes.

95. The defendant reassigned me from a CDS class to a SED class the day after I served them with this federal civil rights suit.

96. At my deposition, I was confused about the date that the reassignment occurred.

97. I have refreshed my recollection after my deposition concerning the date I that my supervisor changed my assignment.

98. My recollection is that I received a call telling me that my assignment was changed to a SED class during the last week of August, only service of my federal law suit.

96. I believe that the placing me with non-communicative students was to limit my speech with students and in retaliation for my past speech.

97. Any other reason that defendant claims is simply a pretext.

/s/ Dan Marchi

Sworn to before me this 9th day of September, 1997.

/s/ Marie Anne Krzanowski
Notary Public
MARIE ANEE KRZANOWSKI
Public, State of New York
Qualified in Albany County
Commission Expires 01-31-99

BOARD OF COOPERATIVE
EDUCATIONAL SERVICES
SPECIAL EDUCATION DIVISION

1979 Central Avenue
Albany, NY 12205
(518)456-9064 Fax (518) 456-9057

December 22, 1995

Mr. Dan Marchi
RD #2, Box 235
Schoharie, NY 12157

Dear Mr. Marchi:

Your return to a teaching position is conditioned upon affirming in writing that you will adhere to the directive not to use any references to religion in class as set out in my letter to you of September 14, 1994. If you wish to return to a teaching position, you must sign the enclosed letter and return it to me.

If I receive the letter by January 5, 1996, you will be reinstated effective February 1. 1996. If I do not receive the letter by January 5, 1996, the Board of Education will tie action at its meeting on January 8, 1996 to terminate you permanently.

Sincerely,

/s/ John J. Daly, Director

Certified Mail- Z 166 640 129
Return Receipt Requested

pc: Dr. Ruth Kellogg
Dr. Donna Trautwein
Dr. Leo DiPierro
Personnel File.

Date 12/28/95

Mr. John J. Daly, Director
Special Education Division
Capital Region BOCES
1979 Central Ave.
Albany, NY 12205

Dear Mr. Daly:

This is to affirm that I will adhere to the directive issued to me in your letter of September 14, 1994. Specifically, I will not use any references to religion in the delivery of my instructional program unless it is a required element of an approved course of instruction and has prior approval by my Supervisor.

Sincerely,

/s/ Daniel Marchi

A53

DAN MARCHI
RD 2 BOX 235
SCHOHARIE. NY 12157

December 28, 1995

John J. Daly
Capital Region BOCES
1979 Central Ave.
Albany, New York 12205

Dear Sir,

I have enclosed an affirmation indicating that I will comply with the directive issued to me on September l4, 1994.

I have two questions regarding the parameters of the directive. First, if a student approaches me and asks me to pray with him in private, am I allowed to pray with the student? Second if a student, without prompting, poses a question concerning religion or morality, am I allowed to answer it? And if so how?

Please write me with specific written guidelines with respect to the two issues raised above.
God bless you.

Sincerely,

/s/ Dan Marchi

BOARD OF COOPERATIVE
EDUCATIONAL SERVICES
SPECIAL EDUCATION DIVISION

1979 Central Avenue
Albany, NY 12205
(518)456-9064 Fax (518) 456-9057

January 16, 1996

Mr. Dan Marchi
RD #2, Box 235
Schoharie, NY 12157

Dear Mr. Marchi:

As a condition of returning to work, you signed an affirmation committing yourself not to use any references to religion in the delivery of your instructional program unless it is a required element of an approved course of instruction and you obtain the prior approval of your supervisor.

Based on the fact that the disciplinary action against you resulted from your defiance of an identical directive rather than a misunderstanding, together with the fact that you had the opportunity to consult counsel before you signed the affirmation, I must assume that you fully understood the terms of your affirmation and that you will abide by them.

Sincerely,

/s/ John J. Daly, Director
pc: Dr. Ruth Kellogg
Dr. Donna Trautwein
Dr. Leo DiPierro
Personnel File

BEST AVAILABLE COPY

A56

Handwritten note from Petitioner to Mr. Czech.

2/28/96

Hi Paul,

Ryan had a good day today. I thank you and the LORD for the tape. It brings the Spirit of Peace to the classroom. Tomorrow is a teachers conference and dismissal is at 11:30.

May God Bless you all richly!

Dan

BOARD OF COOPERATIVE
EDUCATIONAL SERVICES
SPECIAL EDUCATION DIVISION

1979 Central Avenue
Albany, NY 12205
(518) 456-9064 Fax (518) 456-9057

March 25, 1996

Mr. Daniel Marchi
RD #2 Box 235
Schoharie, NY 12157

Dan:

Thank you for the meeting of March 18, 1996. At that time, I informed you of my concern regarding allegations that you were using religious references in regular communications written to the parents. One such letter was in response to a music tape that apparently had a calming affect on a student, you wrote "I thank you and the Lord for the tape as it brings the Spirit of Peace to the classroom," you closed the letter with, "May God Bless you richly." You then indicated that the references were used under the pretext that they were directed to parents, and note used as part of regular classroom instruction.

However, since you communicated these messages in your capacity as a BOCES teacher, and in as much as parents are part of the instructional process, my interpretation of the agreement you signed on December 28, 1995 (see attached) precludes you from communicating in this manner. In addition, the agreement stipulates that you must have the prior permission of your supervisor. I proferred no such permission.

In closing, I cannot anticipate what action, if any, will be taken pursuant to this matter, but I nevertheless implore you to strictly follow this agreement in effect.

If you have any questions or concerns regarding this matter, please do not hesitate to contact me.

Sincerely,

/s/Leo J. DiPierro, Ed.D.
Supervisor of Special Education

cc: Dr. Ruth Kellogg
Mr. M. Bergen
Mr. J. Daly

LJD/cl

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DAN MARCHI,

Plaintiff,

-against- Case NO. 96-CV-1294

BOARD OF COOPERATIVE EDUCATIONAL SERVICES OF ALBANY, SCHOHARIE, SCHENECTADY and SARATOGA COUNTIES,

Defendant.

Examination Before Trial of defendant by its agent, JOHN J. DALY, held pursuant to notice, at the law office of Maynard, O'Connor, Smith & Catalinotto, LLP, 80 State Street, Albany, NY 12207 commencing at 9:20 a.m., August 6, 1997, before Stephen N. Fiato, a Certified Shorthand Reporter and Notary Public for the State of New York.

answer it.

A You want me to answer this based on that clarification?

Q Yes, please.

MR. BELL: If you can.

A You said conversation regarding instruction before the start of school; is that what your --

Q Let me rephrase the question. Suppose Dan and some student have a conversation not related to the curriculum, not talking about homework or math or anything like that: suppose further these conversations occur on the school grounds but not in the classroom, do such conversations fall within the term of the delivery of instructional program? In other words, is that part of his delivery of instructional program? I asked that in that way so the witness can understand what we are talking about.

MR. BELL: Also I ask during school hours or after?

MR. MARCELLE: During school hours.

A I believe it does, yes.

Q Suppose the same scenario only after school hours, again, a conversation not related to the curriculum?

MR. BELL: Objection to form; again on school grounds?

MR. MARCELLE: On school grounds, only this time is after school is over.

A I believe so.

Q Again, assuming that Mr. Marchi and the student had a conversation again not related to

the curriculum, off of school grounds, out of school hours, is that part of Mr. Marchi's delivery of his instructional program?

MR. BELL: Objection to form. You may answer it, if you can.

A Well, in my own personal opinion, given the influence that teachers have, I believe that a teacher's influence is extended often beyond the parameters of the school day.

Q So that just -- I don't want to put words in your mouth, ask you for a yes or no, yes or no,

assuming Mr. Marchi and the student have a conversation after school hours outside of school grounds about noncurriculum related matters, is that part of his delivery of instructional program?

MR. BELL: Objection to form, you can answer it, if you can answer it yes or no.

A Yes, I do.

A No, I wasn't concerned about the letter, any part of the letter.
Q Is it your interpretation -- strike that. Is there any part of Plaintiff's Exhibit 3 that you disagreed with Dr. DiPierro?
A No. I agree with the content of the letter.
(Plaintiff's Exhibit 4 marked for identification.)
Q Let me show you what's been marked as Plaintiff's Exhibit 4 for identification. Ask you if you recognize that?
A --
Q Do you recognize that document?
A Yes.
Q Let me ask you, if a student approaches Dan Marchi and asked him to pray with him in private in the school, during school hours on school grounds, is he allowed to pray with that student?
MR. BELL: objection to form.
A Is he allowed to? I believe he has been recommended that he not.
Q Would it be a violation of the directive of September 14, 1994 to pray with the student in private at the student's request?
A Yes, I believe so.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DAN MARCHI,

Plaintiff,

-against- Case No. 96 CV 1294

BOARD OF COOPERATIVE EDUCATIONAL SERVICES OF ALBANY, SCHOHARIE, SCHENECTADY and SARATOGA COUNTIES,

Defendant.

Examination Before Trial of defendant by its agent, LEO J. DIPIERRO, held pursuant to notice, at the law office of Maynard, O'Connor, Smith & Catalinotto, LLP, 80 State Street, Albany, NY 12207 commencing at 9:10 a.m., August 7, 1997, before Stephen N. Fiato, a Certified Shorthand Reporter and Notary Public for the State of New York.

L. J.. DiPierro
Mr. Daly explain to you what that term meant?
A May I see it again?
Q Sure.
MR. BELL: I would object to the form. You rephrase because there a discussion of what was meant by instructional program within the letter?
Slight distinction.
MR. MARCELLE: I want to know if Mr. Daly talked to him about it.
MR. BELL: Specifically what instructional program meant?
MR. MARCELLE: What the phrase meant.
A I think that we agreed that instructional program in this case had to do with the approved curriculum, the approved curriculum and, as well as, you know, appropriate practices within the context of the instructional day within the context of the instructional program. It was consistent with our definition of instructional process, that is a comprehensive approach to dealing with children and families in a public school setting.
Q So I understand it, when we are talking about delivery of the instructional program, as you understood that phrase it includes activities outside of the classroom as well; is that correct?
A Yes.
Q I mean, also includes any activities during the

school day?
A Yes.
Q Does it include activities outside of the school, after school is over?
A It has.
Q Under what circumstances?
A Circumstances where the teacher may be inviting students over to his or her house or taking students on recreational trips above and beyond the scope of the instructional day. There are a lot of issues inherent in those kinds of practices which sometimes mandate our involvement and/or concern.
Q How do you decide which type of outside school activities involve your concern?
MR. BELL: Objection to form, you can answer it, if you can.
A When we are aware of it. It's not an exact science, some of it is subjective. When we are made aware of it, we do attempt to discuss it with the teacher, recognizing the liability inherent in that kind of interaction and do what we can to ensure that everyone is comfortable with it and it is approved, et cetera.

instructional program?
A Many.
Q When was the first one, if you recall?
A I can't recall.
Q What were the sum or substance of these conversations with Mr. Marchi?
MR. BELL: Objection to form, you can answer it.
Q Let me narrow it down in time frame. Let's talk about the school year 1994 to 1995. That first series, however many there were with Dan Marchi, what were the sum or substance of those conversations?
A Basically, again, reiterating that any discussion of religion or use of religious references needed to be within the context of state approved curriculum. It should not represent his personal beliefs and valuations outside of the course of study, approved course of study.
Q Let's direct your attention forward in time a little bit to February 1996 When Dan returned from his suspension. I take it you were Dan's supervisor when he returned; is that correct?
A Yes.
Q That was at the Iroquois Middle School?

Supreme Court, U.S.
FILED
AUG 20 1999
OFFICE OF THE CLERK

No. 99-36

IN THE

Supreme Court of the United States

DAN MARCHI,

Petitioner,

v.

BOARD OF COOPERATIVE EDUCATIONAL SERVICES OF ALBANY, SCHOHARIE, SCHENECTADY, AND SARATOGA COUNTIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

(1) Whether BOCES had constitutional authority to regulate petitioner's communications with the parents of his students regarding the instructional program based upon a directive which precluded him from making reference to religion in his instructional program without prior supervisory authorization, after he repeatedly violated the Establishment Clause, was formally disciplined for his insubordination, and continued to violate the directive.

(2) Whether the courts below properly denied petitioner's motion to amend his complaint since BOCES has never taken or threatened action against petitioner for activities unrelated to his instructional program.

(3) Where the directive only relates to petitioner's instructional program, is reasonably clear, and has never been applied to interfere with petitioner's ability to practice his religion or engage in free speech in non-instructional contexts, is petitioner's alleged self-censorship beyond the confines of his instructional program, insufficient to comply with Article III standing requirements.

(4) Whether the issues petitioner seeks to litigate in his amended complaint are not sufficiently ripe where they involve hypothetical scenarios that have not yet occurred.

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Respondent respectfully requests this Court to deny the petition for a writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Second Circuit. Petitioner clearly violated the Establishment Clause, and the Board of Cooperative Educational Services for Albany, Schoharie, Schenectady, and Saratoga Counties ("BOCES") acted consistently with well established case law in restricting petitioner's religious proselytization of his students as well as regulating his communications with their parents about instructional matters. This case is not the right vehicle to announce a new framework to address the tensions between the Establishment Clause and the Free Exercise and Free Speech Clauses of the First Amendment. Nor is there any conflict between the Second Circuit's decision and settled case law on Article III standing and the alleged chilling of constitutional rights. Petitioner's amended complaint is not ripe for constitutional adjudication.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, cl. 2 of the United States Constitution provides in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . to Controversies" (U.S. Const., Art. III, cl. 2).

The First Amendment to the United States Constitution provides in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof; or abridging the freedom of speech. . . ." (U.S. Const., amend. I).

COUNTERSTATEMENT OF THE CASE

Petitioner Transforms His Class Into Parochial Education

Petitioner, a certified special education teacher of socially and emotionally disturbed high school students, transformed his classroom into parochial education, basing his teaching methods on his own dramatic religious conversion to Christianity (Pet. App. 3, App. 10, 241).[1] He modified his instructional topics to include forgiveness, reconciliation, and God (Pet. App. 3, App. 10). The mandated English curriculum was replaced with the Book of Psalms and King David's life which were taught in a religious manner (App 10, 242, 246). Petitioner began to pray with the students individually before, during, and after class (App. 10, 242, 243). He ignored his supervisor's informal entreaties to stop teaching religion (App. 148, 182).

BOCES Issues Directive

Accordingly, on September 14, 1995, John Daly, the Director of Special Education, issued a letter directive which provided:

> During our meeting last week, we discussed your frequent references to religion while dealing with students. As you know, public schools are prohibited from offering instruction in support of religious beliefs and practices. Your personal beliefs about the role of religion in society and its value to families and their children cannot be a part of the instruction given to your students.

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1. References to " Pet. App." are to the Appendix to the Petition which includes the decisions below. References to "App." are to the Joint Appendix filed in the Second Circuit.

> Consequently, you are to cease and desist from using any references to religion in the delivery of your instructional program unless it is a required element of a course of instruction for your students and has prior approval by your supervisor, Dr. DiPierro. I am sure that you realize the seriousness of this matter and will comply with this direction.
>
> Best wishes for a good year at Mohonasen. If you have any questions or concerns, please let me know.

(Pet. App. 3-4).

Thus, contrary to petitioner's allegations (Pet. 3), he did not have explicit permission to teach religion prior to the directive. Moreover, even after the directive was issued, and he knew that it was prohibited, petitioner refused to comply because it "would be detrimental to his students and would violate his conscience before God" (Pet. App. 4, App. 11, 124-125, 247-248).

Co-Worker Complains Of Pervasive Teaching Of Religion

On February 10, 1995, a letter complaint was submitted to Dr. DiPierro by a teaching assistant in plaintiff's classroom (Pet. App. 4, App. 125). She indicated that petitioner used the Bible and God as the main subjects in his classroom (App. 409, 410, 553, 554). His techniques were similar to brainwashing techniques of a cult and he discussed Satanism, the devil, and students' possession by evil spirits (App. 553). She overheard petitioner tell his students that he was willing to lose his job over religious issues (App. 554).

Social Worker Testifies As To Disruption Of Educational Program

Charles Rhynhart, a social worker on petitioner's team, testified that all the posters in petitioner's classroom had religious themes (App. 381). Petitioner's conversations with students and co-workers routinely ended with "Praise God", or "I'll pray for you" (App. 381). Petitioner utilized religion, instead of the behavior modification approach followed by the school to address unacceptable behavior (App. 383-384). As a result of petitioner's proselytizing, some of petitioner's students told Mr. Rhynhart that he could not be their counselor unless he accepted God and Jesus as his savior (App. 385).

Charges Filed Against Petitioner

Following an investigation, BOCES initiated charges against petitioner on March 20, 1995, which included the following:

> (1) Conduct unbecoming a teacher in that the teacher expresses his personal views on religion to his students during class, incorporates his religious views into the discussion of academic subjects and distributed religious materials to students for instructional materials.
>
> (2) Insubordination in that the teacher has failed to comply with a written direction given him to cease and desist from using any references to religion in the delivery of his instructional program unless it is a required element of a course of instruction for his students and had been given prior approval from his supervisor.

(App. 57-58, 124, 551).

Petitioner Found Guilty Of Insubordination

A hearing was held before a Hearing Officer pursuant to N.Y. Education Law § 3020-a (McKinney's 1995). Petitioner (Pet. 4) implies that the Hearing Officer recognized the beneficial nature of his religious advocacy, and it was only the School Board that determined to suspend him and require him to comply with the directive as a condition to his returning to work. Petitioner's suspension and the requirement that he comply with the directive were based upon the Hearing Officer's official recommendations (Pet. App. 4, App. 66-67).

The Hearing Officer found that the directive was "clear and unequivocal" and that the import of the memo was unmistakable (App. 63). He further found that petitioner knowingly defied the directive in the face of unequivocal notice, constituting insubordination (App. 62-64). The Hearing Officer observed that petitioner was free to practice his religion and live his faith as he wished, and could refer to religion in the context of the regular curriculum (App. 64-66, 126).

Petitioner Seeks To Continue To Pray And Counsel Students With Reference To God

At the end of the sixth month suspension, Mr. Daly sent petitioner a letter stating that unless petitioner affirmed in writing that he would refrain from using any references to religion in the delivery of his instructional program without prior approval of his supervisor, he would not be allowed to return (App. 12, 69). Upon advice of counsel, petitioner affirmed in writing that he would adhere to the directive (Pet. 4, App. 70). Simultaneously, he sent a letter to Mr. Daly asking: (1) whether he could pray with a student if the student approached him and asked him to pray in private; and (2) whether and how he could answer a student's questions concerning religion and morality (App. 71).

BOCES Declines To Alter Directive

Mr. Daly responded as follows:

> As a condition of returning to work, you signed an affirmation committing yourself not to use any references to religion in the delivery of your instructional program unless it is a required element of an approved course of instruction and you obtain the prior approval of your supervisor.
>
> Based upon the fact that the disciplinary action against you resulted from your defiance of an identical directive rather than a misunderstanding, together with the fact that you had the opportunity to consult with counsel before you signed the affirmation, I must assume that you fully understood the terms of your affirmation, and that you will abide by them.

(Pet. App. 4-5, App. 72).

Shortly after his return, a teacher's aide saw a letter in petitioner's classroom addressed to a parent of a student which provided:

> Ryan had a good day today. I thank you and the LORD for the tape it brings the Spirit of Peace to the classroom. Tomorrow is the teacher's conference and dismissal is at 11:30. May God Bless you all richly!

(Pet. App. 5, App. 73).

Petitioner Warned That Parental Communications Are Subject To Directive

When Dr. DiPierro advised petitioner that DiPierro had been informed that petitioner had similar communications with other parents, petitioner explained that he did not interpret the directive to apply to any of his communications with parents (Pet. App. 5, App. 74). Dr. DiPierro warned petitioner by letter that "since you communicated these messages in your capacity as a BOCES teacher, and in as much as parents are part of the instructional process, my interpretation of the agreement you signed . . . precludes you from communicating in this manner" (Pet. App. 5-6). However, no action was taken against petitioner in connection with this incident (Pet. App. 6).

Petitioner Admits Violating Directive After Suspension

Petitioner has admitted that he continued to violate the directive in 1997 by making references to God during class and counseling students with reference to God (App. 247-248). He persisted in recommending that if students accepted Jesus Christ, they were more likely to overcome substance abuse problems (App. 248). Petitioner took the position that prayer was not a religious ritual, and that he prayed and counseled students as a friend, and not as a teacher, making the directive inapplicable (App. 219).

Petitioner Initiates 42 U.S.C. § 1983 Action

Petitioner subsequently initiated a 42 U.S.C. § 1983 action containing six causes of action, alleging violations of his First Amendment right to the free exercise of religion, free speech, academic freedom, and the Religious Freedom Restoration Act (App. 9-14). He challenged his transfer to the CDS class, alleging that he had been retaliated against

for exercising his constitutional rights (App. 13-14). He sought to void the directive, as well as the disciplinary action, obtain lost wages and benefits due to the suspension, and obtain an order enjoining BOCES from interfering with his constitutional rights, as well as attorneys' fees (App. 14). BOCES answered, denied the complaint, and moved for summary judgment (App. 100-102, 127-128).[2]

Petitioner Seeks To Amend Complaint Based On Hypothetical Questions

After discovery was completed, petitioner cross-moved for summary judgment, and sought leave to amend his complaint in order to expand his allegations relating to the directive's purported overbreadth and chilling of protected speech (Pet. App. 6). BOCES opposed the cross motion for summary judgment and for leave to amend the compaint. (App. 294-297, 309-316).

Petitioner's amended complaint included allegations that BOCES violated his First Amendment rights by interpreting the directive to constrain petitioner from communicating with students on matters unrelated to school curriculum both on school and off school grounds during non-class times (Pet. App. 6). Petitioner alleged that he had never received any guidance about the directive, and that his request for objective criteria had been summarily denied (App. 109). He further alleged that the lack of guidance prevented him from praying with students and co-workers, and answering students' questions with reference to God (App. 109). In his amended complaint, petitioner relied upon the deposition

2. Petitioner moved for a preliminary injunction to enjoin enforcement of the directive (App. 113-118). The District Court for the Northern District of New York (Scullin, J.) denied the motion, concluding that the meaning and scope of the directive were clear to a person of ordinary intelligence and that the directive was not vague or overbroad (App. 127-128).

testimony of Mr. Daly, who authored the directive, and Dr. Pierro, his immediate supervisor, to demonstrate that BOCES intended to apply the directive to curtail protected speech (Pet. App. 6, 63-66).

At his deposition, Mr. Daly testified that the directive was necessary in light of petitioner's repeated and pervasive use of religion in his instructional program, and his refusal to comply with repeated entreaties to comply with the school's constitutional mandate (App. 148). Daly defined the term instructional program to include "the actual teaching of content with the expressed intent of sharing curriculum content [and] context with students" (App. 160). He stated that the instructional program can occur outside the classroom, giving homework assignments as an example (App. 160). In his view, conversations between petitioner and his students which occurred on school grounds during or after school hours could constitute part of the instructional program even if the subject matter was not part of the mandated curriculum, depending on the circumstances (App. 161-163). When asked whether a conversation between petitioner and students about issues not directly related to the mandated curriculum could be part of the delivery of his instructional program, Mr. Daly was careful to couch his answer that "in his personal opinion, he believed that a teacher's influence is extended often beyond the parameters of the school day" (App. 163). Mr. Daly did not give any indication that he would take any action against petitioner for out-of-school interactions unrelated to the instructional program (App. 163). Mr. Daly was not asked about particular factual scenarios during the deposition.

Dr. DiPierro, petitioner's supervisor for eleven years, was also deposed. He worked closely with petitioner, both before and after his suspension, to delineate the parameters of the directive and afford petitioner guidance as to how petitioner could achieve values clarification in a secular

context (App. 182-184, 202-204, 216). Dr. DiPierro noted that the instructional program can occur off school grounds such as when students take a field trip or a teacher invites students over his or her house (Pet. App. 64-65). He testified that the instructional program includes more than the lesson plans based on mandated curriculum, and that communications to parents are fairly contained in the definition of instructional program (Pet. App. 65, App. 182-183).

Lower Courts Rule In BOCES's Favor

The District Court granted BOCES's motion for summary judgment and denied petitioner's motion for leave to amend his complaint, which was affirmed by the Second Circuit.

REASONS FOR DENYING THE WRIT

I.

THIS CASE DOES NOT INVOLVE AN UNRESOLVED TENSION BETWEEN THE ESTABLISHMENT CLAUSE AND THE FREE SPEECH AND FREE EXERCISE CLAUSES OF THE FIRST AMENDMENT. EVEN IF THIS COURT SEEKS TO CONSTRUCT A FRAMEWORK TO RESOLVE THESE TENSIONS, THIS CASE IS NOT THE RIGHT VEHICLE TO DO SO.

The petition does not warrant review by this Court. The Second Circuit applied settled law in holding that BOCES did not infringe petitioner's free exercise rights in restricting his religious expression to avoid Establishment Clause violations, finding that the challenged directive was neither vague nor overbroad. Significantly, petitioner has abandoned his claim that BOCES violated his constitutional rights when it disciplined him, in effect conceding that his conduct violated the directive, and could be restricted without implicating his constitutional rights.

Petitioner's application is predicated upon the erroneous premise that this case is an appropriate vehicle for this Court to develop a new framework for resolving a teacher's free exercise claims within the public school context. The directive only relates to petitioner's instructional program, and was properly upheld since public school officials have the authority to prevent teachers from giving students and parents the impression that the school prefers a particular religion or religion in general. The public forum analysis used to resolve free speech claims regarding private religious expression has no bearing here.

The petition is replete with factual omissions, improper references to case law that does not stand for what petitioner represents it to be (*see, e.g., Tucker v. State of California Department of Education*, 97 F.3d 1204 (9th Cir. 1996); (Pet. 13)), reliance upon legal analysis taken out of context, as well as citation to case law that has been vacated (*see, e.g., Boring v. Buncombe County Bd. of Educ.*, 98 F.3d 1474 (4th Cir. 1996); (Pet. 13), *vacated by grant of reh'g en banc*, 1996 U.S. App. LEXIS 31165 (4th Cir. 1996), *different results reached on reh'g*, 136 F.3d 364 (4th Cir.), *cert. denied*, __U.S.__, 119 S. Ct. 47, 142 L. Ed. 2d 36 (1998)). This is a sufficient basis to deny the petition.

A. Public School Teachers Are Subject To Greater Regulation

While the Second Circuit acknowledged that the directive unquestionably restrains petitioner's First Amendment rights, the Court recognized that the special nature of public educational institutions affords school officials comprehensive authority to prescribe and control conduct, and as well as providing them with a compelling interest in justifying the abridgement of free speech otherwise protected by the First Amendment (*Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 507, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993); *citing Widmar v. Vincent*, 454 U.S. 263, 271, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981)).

The Court began with the principles regarding the establishment-of-religion set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) and *Agostini v. Felton*, 521 U.S. 203, 234, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997). The Second Circuit was careful not to invalidate activity that has a primary secular purpose and only incidental religious significance. However,

it recognized that when government endeavors to police itself and its employees to avoid transgressing the Establishment Clause, it must be given some leeway, even if the activity is ultimately determined not to violate the Establishment Clause, and the actions would otherwise be protected if the individual involved were not a public employee (*cf.*, *Waters v. Churchill*, 511 U.S. 661, 671, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994) (plurality opinion)).

The Second Circuit concluded that since petitioner's letter addressed a matter directly related to his professional duties as a CDS teacher, it was within the directive's scope regarding the "delivery of [petitioner's] instructional program". The Court reasoned that while the letter was slight in its religious references, it sufficiently intruded religious content into a curricular matter, such that BOCES could reasonably be concerned that communications of this sort would expose it to non-frivolous Establishment Clause challenges. Accordingly, the application of the directive to parental communications about the instructional program did not impermissibly infringe petitioner's free exercise rights. The Court also rejected petitioner's claim that he was not on notice that such conduct violated the directive, since no action was taken, and he was merely warned that his communications with parents about instructional matters would be considered to be part of his instructional program.

B. BOCES Has A Compelling Interest In Avoiding Establishment Clause Violations

This Court has consistently struck down organized religious activities or school endorsement of religion (*see, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992) (schools prohibited from sponsoring invocations and benedictions at graduation where ceremony conducted by the school, it occupies an important place and school controls the program since even subtle or

indirect coercion of impressionable students may violate the Establishment Clause); *Edwards v. Aguillard*, 482 U.S. 578, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987) (state statute mandating teaching of creation science held unconstitutional advancement of religious doctrine in violation of the Establishment Clause); *Wallace v. Jaffree*, 472 U.S. 38, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985) (state statute authorizing one minute period of silence to encourage prayer in public schools invalidated); *Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199 (1980) (posting of Ten Commandments on public school wall violated the Establishment Clause); *Epperson v. Arkansas*, 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968) (statute prohibiting teaching of evolution invalidated as violative of the Establishment Clause); *School Dist. of Abington v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (statute mandating daily reading of Bible and recitation of Lord's Prayer held unconstitutional); *Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962) (non-denominational prayer recited in the classroom held unconstitutional); *McCollum v. Bd. of Ed*, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948) (religious instruction which had been carried out for a certain period each week invalidated)).

Thus, BOCES has a compelling interest in avoiding Establishment Clause violations which justifies the abridgement of plaintiff's free exercise, freedom of association, and free speech claims otherwise protected by the First Amendment (*see*, *Lamb's Chapel v. Center Moriches Union Free School District*, *supra*, at 394, *quoting*, *Widmar v. Vincent*, *supra*, at 271).

Students should not be given the impression that the school officially sanctions or prefers religion generally, or a specific religion in particular (*see*, *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1993), *cert. denied*, 515 U.S. 1173, 115 S. Ct. 2640, 132 L. Ed. 2d 878 (1995)).

Accordingly, school officials have the authority to prevent public school teachers from expressing their religious viewpoints, or praying with or in the presence of students both in the classroom and in comparable settings (*Helland v. South Bend Comm. Sch. Corp.*, 93 F.3d 327 (7th Cir. 1996), *cert. denied*, 519 U.S. 1092, 117 S. Ct. 769, 136 L. Ed. 2d 715 (1997); *see also*, *Chandler v. James*, __ F.3d __, 1999 U.S. App. LEXIS 15608 (11th Cir. 1999) (teacher participation in student-initiated prayer improperly entangles the State in religion and signals an unconstitutional endorsement of religion); *Peloza v. Capistrano Unified Sch. Dist.*, *supra*, (court sustained directive which precluded teacher from discussing his religious beliefs during instructional time whether inside or outside of the classroom); *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), *cert denied*, 505 U.S. 1218, 112 S. Ct. 3025, 120 L. Ed. 2d 896 (1992) (court upheld restriction of teacher's reading Bible to himself in front of class, as well as use of poster which requested readers to open their eyes to see the hand of God); *Doe v. Duncanville Ind. Sch. Dist.*, 994 F.2d 160 (5th Cir. 1993); *subsequent appeal*, 70 F.3d 402 (5th Cir. 1995) (unconstitutional for coach or other school official to initiate, lead or participate with a team in prayer, or to ask a team member to do so before, during or after a public or school sponsored athletic activity or event); *Jager v. Douglas County Sch. Dist*, 862 F.2d 824 (11th Cir. 1989), *cert. denied*, 490 U.S. 1090, 109 S. Ct. 2431, 104 L. Ed. 2d 988 (1989) (invocations by clergy at public officials' request prior to public school football game held unconstitutional); *Altman v. Bedford Central Sch. Dist.*, 45 F. Supp. 2d 368 (S.D.N.Y. 1999) (court enjoined various teaching activities, as well as the sale of worry dolls in the school store, which were found to violate the First Amendment rights of students since teachers and speakers sponsored by the school must remain neutral towards all religions, neither sponsoring nor disparaging any religious beliefs)).

Tucker v. California, *supra*, upon which petitioner relies, is not to the contrary. In *Tucker*, the Ninth Circuit held that the public employer had failed to justify a broad order *applicable to all employees* which prohibited them from displaying any religious materials in any part of the workplace other than their closed offices or defined cubicles, and engaging in any religious advocacy during work hours in the workplace. Since the government failed to establish that its interests justified the breadth of the ban, it was invalidated. However, the Court expressly distinguished the facts from a situation involving public school teachers (97 F.3d at 1212-1213).[3]

C. Parents May Understand Teacher Expression Has State's Imprimatur

The Second Circuit noted that this Court has recognized that parents may understand that certain expression by a teacher bears the imprimatur of the State (*see*, *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988) (school district may regulate "expressive activities that students, parents or members of the public might reasonably perceive to bear the imprimatur of the school")). Petitioner's attempt to distinguish *Hazelwood* (Pet. 14-15) is predicated upon a simplistic, and unduly constrained concept of the instructional program involved in public education, and in particular, with special education provided pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, *et seq*.

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3. As noted, since the decision in *Boring v. Buncombe County Bd. of Ed.*, 98 F.3d 1474 (4th Cir. 1996) was vacated, and different results were reached after the rehearing *en banc* (*see*, 136 F.3d 364 (4th Cir.), *cert. denied*, __ U.S. __, 119 S. Ct. 47, 142 L. Ed. 2d 36 (1998), the *Boring* decision cited by petitioner is no longer good law.

Moreover, courts have applied *Hazelwood* to teachers' conduct as well as students' conduct since pedagogical interests are equally applicable to both (*see, e.g., Silano v. Sag Harbor Union Sch. Dist.*, 42 F.3d 719 (2d Cir. 1994), *cert. denied*, 515 U.S. 1160, 115 S .Ct. 2612, 132 L. Ed. 2d 856 (1995); *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991)).

In any event, petitioner's attempt to dismiss the letter as private correspondence between two friends distorts the facts beyond recognition. No one rifled in his personal correspondence, and one does not usually advise friends in private correspondence that there is early dismissal from school or comment on a student's behavior in school. In addition, there was evidence that petitioner had similar communications with other parents, and viewed everyone as a friend when he was expressing his religious views (App. 219).

Thus, contrary to petitioner's contention (Pet. 12), this case does not involve a novel issue which affects the rights of hundreds of thousands of public employees. The letter did not simply involve the kind of adult to adult communication that occurs regularly in every public employment context.

D. Disruptive Workplace Doctrine Is Applicable Here

Petitioner also asserts that the disruptive workplace doctrine has no application to the case at bar, and that BOCES never even claimed that his conduct was disruptive (Pet. 13). This is simply untrue. BOCES previously argued that petitioner had undermined the behavior modification approach adopted by the team, and had either alienated or supplanted other professionals on the team raising serious problems for BOCES, in addition to raising legitimate

Establishment Clause concerns (BOCES's Brief to the Second Circuit, pp. 37-38 which can be found in the Appendix to Respondent's Brief in Opposition, App. 1a). Petitioner's § 3020-a hearing was also replete with testimony that demonstrated that petitioner's conduct had been disruptive (App. 125, 553, 554, 383-385). Under the *Waters v. Churchill* standard, courts examine whether the conduct impairs discipline, co-worker relations, impedes the performance of the employees' duties, or the operation of the enterprise (*see also*, *Pickering v. Bd. of Ed.*, 391 U.S. 563, 569-70, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)). The letter, which was only one aspect of the continuing problems caused by petitioner's conduct, cannot be viewed in isolation.

The Second Circuit's appreciation of the dilemmas facing public schools when teachers violate the Establishment Clause, and the difficulty of ascertaining the precise boundaries of the First Amendment rights of their employees, does not establish a precedent which will be cavalierly used to violate the constitutional rights of teachers or other public employees. It is only by divorcing the decision from its factual underpinnings, that petitioner can attempt to transform a reasonable decision which is consistent with precedent into a so-called vehicle of religious oppression.

II.

THERE IS NO CONFLICT BETWEEN THE SECOND CIRCUIT'S DECISION REGARDING THE APPROPRIATE STANDARD TO ASSESS WHETHER THERE IS SUFFICIENT CHILLING OF CONSTITUTIONAL RIGHTS TO ESTABLISH STANDING AND OTHER CIRCUIT COURT DECISIONS OR DECISIONS OF THIS COURT.

Petitioner has also failed to establish that the Second Circuit decision is squarely inconsistent with other Circuit Court

decisions or the decisions of this Court regarding the standards for establishing Article III standing in cases implicating First Amendment concerns. Petitioner has manufactured the conflict in order to meet the criteria for Supreme Court review. The Second Circuit properly concluded that petitioner failed to present evidence that his constitutional rights were reasonably chilled or that the case presented a ripe controversy regarding the hypothetical claims in his amended complaint.

A. Petitioner Failed To Establish A Credible Threat of Enforcement

The Court denied petitioner's request for leave to amend his complaint since Article III of the United States Constitution limits the jurisdiction of the federal courts to cases or controversies, *citing Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 2d 826 (1941)) for the proposition that

> [t]he question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, or sufficient immediacy and reality to justify judicial resolution.

The District Court refused to grant petitioner's motion to amend the complaint, concluding that petitioner's refusal to give a common sense meaning to the directive did not transform the directive into an unconstitutional infringement of his constitutional rights, or raise his allegations of chilling to constitutional proportions. Relying upon *Poe v. Ullman*, (367 U.S. 497, 503-508, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961), *reh'g denied by*, 368 U.S. 869, 82 S. Ct. 21, 7 L. Ed. 2d 69 (1961)) and *Laird v. Tatum*, (408 U.S. 1, 12-13, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972), *reh'g denied by*, 479 U.S. 911, 107 S. Ct. 309, 93 L. Ed. 2d 284

(1986)), the Second Circuit affirmed, finding that petitioner had failed to demonstrate a credible fear of enforcement even under the relaxed standards applicable to First Amendment litigation.

The determination of the Second Circuit that petitioner did not face a credible threat of enforcement for off campus activities is a factual determination which does not merit Supreme Court review. The Court found Mr. Daly's testimony to be ambiguous and qualified as his "personal opinion". It also relied upon the fact that BOCES never indicated that it intended to apply the directive to petitioner's off-campus expressive activities on matters unrelated to his instructional program. The Second Circuit noted that petitioner had not even alleged that BOCES had attempted to regulate his communications on matters unrelated to school even though he sought to challenge the regulation in this regard. Accordingly, petitioner's self-created censorship was not sufficient to create Article III standing, or sufficient chilling in the circumstances.

The Court's determination is not in conflict with established case law. Contrary to petitioner's contention (Pet. 17, 21), the Second Circuit did not graft a third requirement of the two part test of *Laird v. Tatum* (*supra)* by holding that a plaintiff must demonstrate that there has been actual enforcement of a directive to satisfy the Article III standing requirement. Rather, the Court determined that there was no credible threat of enforcement and no evidence that BOCES was going to enforce the valid directive in an unconstitutional manner. Speculative fears of prosecution are insufficient to establish standing (*Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)).

Petitioner concedes that in order to clear Article III standing, he must show that: (1) he has personally suffered

some actual or threatened injury as a result of the challenged conduct; (2) the injury can fairly be traced to the threatened conduct; and (3) the injury likely will be redresssed by a favorable decision from the court (*see, e.g., Valley Forge Christian Coll. v. Americans United for Separation of Church and State,* 454 U.S. 464, 472, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982); *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 12 (1st Cir. 1996)). Petitioner failed to establish that he suffered any concrete injury that is objectively traceable to any action of BOCES regarding new allegations in the amended complaint.

The cases upon which petitioner relies recognize that the difference between an abstract question and a "case and controversy" is one of degree which is not discernable by any precise test (*see, e.g., Babbitt v. United Farm Workers Nat'l Union, supra*). Each First Amendment case must be decided on its own merits (*Bishop v. Arnov, supra* at 1070), and none of the cases upon which petitioner relies (Pet. 19-22) are factually analogous.

For example, in *ACLU v. Florida Bar*, (999 F.2d 1486 (11th Cir. 1993)), the Court held that a candidate for judicial office had raised a serious likelihood of disciplinary action for violating an ethical canon where the state's Ethics Committee had issued an advisory opinion that plaintiff's proposed speech criticizing his opponent would violate Ethical Canon 7(b)(1)(a). Since the dispute involved a particular speech, the Court found that the plaintiff's self-censorship was sufficient to establish standing since there was a credible threat of enforcement. The issues were not hypothetical but were clearly defined. Here, the very opposite is true, which is a lynchpin of the Second Circuit's decision.

So too, *New Hampshire Right to Life Political Action Comm. v. Gardner* (*supra*) (Pet. 20), only addressed whether the plaintiff had personally suffered some actual or threatened

injury. There was a state statute which restricted election contributions to $1,000. The First Circuit applied well established case law to conclude that the plaintiffs did not have to wait until the statute was enforced against them to test its constitutionality since there was a credible threat of enforcement if they violated the ceiling on expenditures. Self-censorship was sufficient since plaintiff had been advised that the state would enforce the statute, and the statute suppressed a core activity protected by the First Amendment.

The loyalty oath cases upon which petitioner relies are also distinguishable (*see, Keyishian v. Board of Regents*, 385 U.S. 589, 604, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967); *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964)). Both cases involved statutes which applied to all teachers, and required compliance or loss of employment. In addition, the Court in *Baggett* held that the oath was vague, making it more likely that the plaintiff would be more likely to restrict his speech rather than risk loss of employment. The Hearing Officer, the District Court, and the Second Circuit all found that the directive at issue is not vague, and that petitioner was provided with extensive guidance as to its proper parameters, undermining petitioner's chilling argument.

Nor is the decision below inconsistent with *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988) (Pet. 21-22). *Virginia* involved a pre-enforcement facial challenge to a criminal statute, and plaintiffs might have had to take significant and costly compliance measures under the statute or risk criminal prosecution, suffering harm based upon their *actual and well-founded fears*. Since there was a question as to the proper interpretation of the statute which might affect the outcome of the litigation, the Supreme Court certified the question to the Virginia Supreme Court for an interpretation of the statute since the Court did not want to address a constitutional issue without a definitive interpretation of the statute. Ultimately,

the case was vacated and remanded in light of the Virginia Supreme Court's interpretation of the statute (*Virginia v. American Booksellers Ass'n.*, 488 U.S. 905, 109 S. Ct. 254, 102 L. Ed. 2d 243 (1988)).

In striking contrast, the Second Circuit found that petitioner did not have well founded fears that were sufficient to meet the chilling requirements. Moreover, petitioner sought to litigate a broad range of hypothetical situations which had not been delineated. In addition, the Court rejected his facial challenge to the directive.

Contrary to his contention (Pet. 22), petitioner has not been placed on the horns of a grave dilemma without redress. Rather, petitioner has refused to distinguish between the "chilling" of his conduct which is clearly proscribed by the directive, and situations which he unreasonably asserts are covered by the directive, as to which no action has been taken or is reasonably threatened.

B. The Amended Complaint is Not Ripe

The Second Circuit also properly concluded that petitioner failed to present a ripe controversy with respect to the application of the directive to his off-campus communications with students on matters unrelated to the school curriculum. In so doing, the Court examined both the fitness of the issues for judicial decision and the hardship that would result if judicial consideration was withheld (*Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)). Pre-enforcement challenges must grow out of real substantial controversies between the parties which are defined and concrete (*see generally Gardner v. Toilet Goods Assoc.*, 387 U.S. 167, 87 S. Ct. 1526, 18 L. Ed. 2d 704 (1967) (courts must determine whether the resolution of the underlying legal issues would be facilitated if raised in the context of a specific

attempt to enforce the challenged provision)). Courts have been reluctant to intervene in conflicts which arise in the daily operation of public schools, and only do so for actual conflicts which "directly and sharply implicate constitutional values" (*Epperson v. Arkansas*, *supra* at 104).

Given the unique nature of student-teacher relationships, the Second Circuit noted that it was easy to imagine a variety of circumstances that might fall within the challenged hypothetical application of the directive, some of which may be regulated constitutionally, and some of which may not. Since BOCES had not threatened to apply the directive to any of petitioner's off-campus activities, the Second Circuit would have been forced to guess how BOCES might apply the directive and pronounce the validity of numerous possible applications of the directive, which were as of yet hypothetical. The litany of questions contained in the petition (Pet. 24) confirms the hypothetical nature of his amended complaint, and the wisdom of the Second Circuit's declination to answer his hypothetical questions.

The Court reached a similar conclusion with respect to petitioner's request to test the application of the directive to on-campus, after-class conversations with students on matters not related to the curriculum and his responses to student's requests for prayer. We do not dispute that BOCES has taken the position that petitioner should not pray with students and counsel them with respect to God and his personal religious beliefs at school. During oral argument, the Second Circuit explored various hypotheticals that might occur with respect to prayer and counseling on school grounds. It was clear during oral argument that the Second Circuit felt that even in this area, the issue should not be litigated in the abstract. It was influenced by the fact that there was no evidence that BOCES had or intended to enforce the directive in an illegal manner. There is no reason to disturb that judgment.

The Second Circuit's determination to affirm the denial of petitioner's application to amend his complaint must been viewed in the context of its rejection of petitioner's facial challenge to the directive on the ground that it was unconstitutionally vague and overbroad. Petitioner has abandoned his overbreadth argument (Pet. 21). His vagueness argument is also without merit, since the basic meaning of the directive is as clear as the context permits, and gives petitioner fair notice of what conduct is proscribed (*see, New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984)). The Second Circuit properly held that BOCES was not obligated to articulate every imaginable situation that might fall within the directive's purview (*see, e.g, Ward v. Hickey, supra*).

The Second Circuit rejected petitioner's contention that BOCES had refused to provide any explanation of the term "instructional program", finding that it was not unreasonable for BOCES to view his initial request for clarification as insincere when received simultaneously with his signed affirmation that he would comply with the directive. The Court also relied upon the documented evidence that petitioner had been provided with extensive guidance regarding the ambit of the directive after returning to teaching from his suspension (Pet. App. 20-21). This effectively undermines petitioner's request for Supreme Court review of the Second Circuit's determination on chilling.

A barren record is not the appropriate case to address these issues. The Second Circuit's insistence on factual boundaries within which to adjudicate constitutional issues is predicated on sound jurisprudential principles.

III.

IT WOULD BE INAPPROPRIATE FOR THIS COURT TO CONSTRUCT CONSTITUTIONAL GUIDELINES TO GOVERN TEACHER COMMUNICATIONS WITH STUDENTS DURING NON-INSTRUCTIONAL TIME IN RESPONSE TO THE HYPOTHETICAL SITUATIONS PETITIONER HAS POSITED IN HIS AMENDED COMPLAINT.

Thus, this Court should reject petitioner's invitation to construct general guidelines for assessing the constitutional boundaries of teacher communications with students during non-instructional time. The Second Circuit properly declined petitioner's invitation.

Petitioner asks this Court to resolve the point at which a teacher sheds the imprimatur of the state when speaking to students (Pet. 23). While petitioner concedes that when a teacher speaks on matters concerning the curriculum, his speech is indelibly stamped with the state's imprimatur, and is subject to regulation (*Edwards v. Aguillard*, *supra*), he asserts that this Court has never suggested that the imposition of the state's imprimatur on a governmental employee is independent of the nature of the conversation and the nature of the relationship between the speaker and the listener (*citing*, *Lee v. Weisman*, *supra*; *Board of Educ. of Westside Comm. Sch. v. Mergens*, 496 U.S. 226, 248-53, 110 S. Ct. 2356, 110 L. Ed. 2d 191 (1990); *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)). Even if that were true, it is irrelevant to this case.

BOCES only regulated petitioner's speech insofar as it affected his instructional program, which clearly goes beyond the "curriculum" as petitioner has narrowly defined it (Pet. 23). BOCES has not intruded upon private relationships

which do not involve petitioner's instructional program. Petitioner's attempt to limit his public role to the mandated curriculum is contrary to well-settled Establishment Clause jurisprudence (*see, infra*, pp. 13-16), as well as Congress' recognition that a teacher's public role transcends the boundaries of classroom instruction (*see*, Equal Access Act, 20 U.S.C. § 4071[a]; *Board of Educ. of Westside Comm. Sch. v. Mergens*, *supra*). Since petitioner is not merely a private party in a public forum, neither *Capital Square Review Bd. v. Pinette,* (515 U.S. 753, 770, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995)) or *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, (*supra*) afford him protection to advocate his religious views even in response to student initiated requests. Nor does *Rosenberger v. Rector and Visitors of the University of Virginia,* (*supra*) preclude BOCES's actions. BOCES did not engage in unconstitutional viewpoint discrimination since petitioner's speech was not private, and BOCES had legitimate Establishment Clause concerns.

Petitioner asks this Court to speak on matters that need no clarification for the boundaries of the proper role of public school teachers with respect to the instructional program and school activities are not amorphous. To the extent that open questions may exist about teachers' conduct outside of instructional matters and school activities, he seeks guidance well beyond this Court's jurisprudential limits. Accordingly, the petition should be denied.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — EXCERPTS FROM BOCES'S BRIEF TO THE SECOND CIRCUIT

* * *

In addition, plaintiff undermined the behavior modification approach adopted by the team, and has either alienated or supplanted other professional members of the team raising serious concerns on the part of BOCES. There is no question that BOCES has an interest as an employer in regulating the expressive activity of its employees that differs significantly from those government possesses in regulating the expressive activities of its citizenry (*Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686 [1994] [plurality opinion]; *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 [1968]). In determining whether the employer's interest in effective functioning is disrupted, courts examine whether the conduct impairs discipline, co-worker relations, or impedes the performance of the actor's duties, or the operation of the enterprise, among other factors (*Pickering v. Board of Educ.*, *supra*, 391 U.S. at 569-70). We submit that plaintiff's admitted defiance of the directive clearly undermined BOCES' educational objectives, impaired discipline, and undermined relations between co-workers.

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